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# In the Supreme Court of the United States

OCTOBER TERM, 1975

INTERSTATE COMMERCE COMMISSION

*v.*

CENTRAL OF GEORGIA RAILROAD COMPANY, ET AL.

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA*

## JURISDICTIONAL STATEMENT

ROBERT S. BURK,
*Acting General Counsel,*
CHARLES H. WHITE, Jr.,
*Associate General Counsel,*
RAYMOND MICHAEL RIPPLE,
*Attorney,*
*Interstate Commerce Commission,*
*Washington, D.C. 20423.*

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APPELLEES

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## JURISDICTIONAL STATEMENT

### OPINIONS BELOW

The opinion of the district court (App. A, *infra*) is reported at 410 F. Supp. 354. The order of the Commission upon which this action was brought (App. C, and D *infra*) are reported at 421 U.S. 957 (App. E, *infra*), affirming a prior opinion of the district court reported at 379 F. Supp. 976 (App. F, *infra*). The Commission's original report and order is reported at 349 I.C.C. 377 (App. J., *infra*), but the Review Board's decision is unreported (App. K., *infra*).

## JURISDICTION

This action was initiated by the railroads to seek enforcement of a prior judgment of the district court, and asked for injunctive relief against the Commission's order reopening this case. The final judgment was entered by the three-judge district court on May 17, 1976 (App. B, *infra*). The Interstate Commerce Commission filed its notice of appeal on July 15, 1976, and the United States did so on July 16, 1976 (App. G and H, *infra*). Jurisdiction of this Court to review the judgment of the district court on direct appeal is conferred by 28 U.S.C. 1253.

## STATUTES INVOLVED

The statutes primarily involved in this case are the Interstate Commerce Act, §§ 15(1) and 15(7),[1] 49 U.S.C. §§ 15(1) and 15(7), the texts of which are reprinted in Appendix I.

## QUESTIONS PRESENTED

1. Whether the court below, in prohibiting the Interstate Commerce Commission from reopening a § 15(7) rate proceeding, erred by interfering with the agency's discretion to both establish decisional stand-

[1] While this matter was pending before the district court, Section 15(7) was amended by Section 202(e) of the Railroad Revitalization and Regulatory Reform Act of 1976. (Feb. 5, 1976). See *United States* v. *Chesapeake & Ohio R. Co.* U.S. , fns. 7 and 9. This amendment, however, has no bearing on the issues raid on this appeal.



ards, and to determine the appropriate proceeding in which to apply these standards to complex questions relating to rate-making.

More specifically, this question embraces two subsidiary questions:

A. Must the Commission demonstrate how multiple car operations are based on inherent cost savings—even though that principle has long been recognized and applied by the Commission—in every rate proceeding in which the carrier seeks to substitute higher single-car rates for the applicable multiple-car rates?

B. If, in fact, the Commission does have such an obligation to demonstrate cost advantages of multiple-car operations, did the lower court err in foreclosing the agency's opportunity to do so in this case by prohibiting a reopening of the proceeding?

## STATEMENT

The Central of Georgia Railway Company, the Seaboard Coast Line Railroad Company, the Sandersville Railroad Company, and the Southern Railway Company transport kaolin clay from the Toomsboro District of Georgia to the Georgia ports of Savannah and Port Wentworth. The clay is then shipped aboard, where it is increasingly in demand by the paper and rubber industries (App. pp. 46a, 48a, 49a). Before 1961, the rail export rate to the Georgia ports was $3.50 per ton on a minimum carload rate of 30 tons. In 1961, the rail carriers instituted a new rate of $3.34

per ton, on a minimum carload rate of 50 tons, for a single-car shipment. In 1962 they instituted a multiple-car rate [2] of $2.88 per ton, for 10 or more cars of 50 or more tons each, moving as a unit. By 1969 the multiple-car rate was $3.18 per ton (minimum shipment of 500 tons), while the single-car rate was $3.68 per ton for a minimum shipment of 50 tons and $3.96 per ton for a minimum shipment of 30 tons (App. pp. 47a–48a).

In 1969 the rail carriers filed tariff changes under Section 15(7) of the Interstate Commerce Act, 24 Stat. 384, as amended, 49 U.S.C. 15(7),[3] cancelling the multiple-car rate effective March 14, 1970.

The United States Clay Producers Traffic Association, Inc., a trade organization representing the interests of clay producers, filed a protest with the Interstate Commerce Commission ("Commission"), as did the Georgia Ports Authority, which owns and operates docks and warehouse facilities at the Port of Savannah. The Traffic Association contended that cancellation of the multiple-car rate would substantially injure shippers of bulk volume materials, including its members, that have made large investments and tailored their operations to volume rates

[2] A multiple-car rate is defined by the Commission as one which applies only to a shipment tendered on one bill of lading from one consignor to one consignee at a single destination in quantities exceeding the capacity of a single car and which is lower than the contemporaneously applicable rate on the same commodity tendered in single-car quantities.

[3] The text of the statute is set forth in App. I.



related to the economics of volume movement. The Georgia Ports Authority contended that it could not reach the break-even point on its investment in a new $10 million dry bulk handling facility if its projected movement of bulk clay for export, which was predicated on the continuation of the multiple-car rate, were to deteriorate due to the imposition of the higher, single-car rate (App. pp. 50a–51a).

The Commission, pursuant to Section 15(7), suspended the proposed tariffs for the full seven-month period. The tariffs became effective on October 14, 1970, before a decision had been reached.

The Commission assigned the investigation to a three-member Review Board for initial disposition (App. pp. 60a–91a). The Review Board found that there was no present competitive need for the multiple-car rate (App. p. 69a), that the multiple-car rate could not be justified by operating or cost considerations (App. pp. 90a–91a), that the new, single-car rates were not unreasonable in relation to the cost of service (App. p. 86a), and that the new rates would not adversely affect the volume of clay shipped from the Toomsboro District to the Georgia ports (App. p. 69a). Based on these findings, the Review Board concluded that the cancellation of the multiple-car rate was just and reasonable, and that the new, single-car rates, being just and reasonable, were lawful (App. p. 91a).

A three-member appellate division of the Commission reviewed the decision of the Review Board (App.

pp. 45a–59a). The Commission found the Review Board's statement of facts to be accurate, and adopted it, with certain supplemental findings of fact, as its own (App. p. 46a). The Commission agreed that the multiple-car rate was not required by competitive necessity (App. p. 54a). It found that the movement of clay for export had increased in each successive year from 1961 through 1969 (App. p. 56a), even though the rate charged by the rail carriers had increased during that period, and that this evidence demonstrated that elimination of the multiple-car rate would not significantly impede the movement of clay for export. The Commission also found that the new, single-car rate was not unreasonable in relation to the cost of service (App. p. 54a), and that the multiple-car rate was not justified by operating or cost considerations (App. p. 57a).

Nonetheless, the Commission found that the carriers had not satisfied their burden of proof under Section 15(7)[4] because they had not demonstrated the existence of any conditions that rendered unreasonable an expectation of achieving the cost savings "normally inherent in multiple-car service" (App. p. 57a). The Commission acknowledged that it was imposing an additional requirement, but defended its imposition by reasoning that, without such a requirement, shippers

[4] Section 15(7) states in relevant part: "At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable * * *.



and others that had come to rely on the continuation of multiple-car rates would suffer "sudden sharp increases" in rates whenever the carriers ceased to maintain "the high degree of operational efficiency" that use of the lower, multiple-car rate requires (App. p. 58a).[5] Because the Commission found no indication in the record that the carriers were prevented by "internal operational difficulties" from handling multiple cars as a unit-train, and no indication in the record that shippers and port operators could not or would not accept multiple-car shipments, it concluded that the carriers had not shown the existence of any conditions that rendered unreasonable an expectation of achieving the cost-savings that the Commission claimed were inherent in multiple-car service. Accordingly, the Commission found that the proposed cancellation of the multiple-car rate would result in a single-car rate that was not "just and reasonable". The Commission ordered that the carriers cancel the new tariff. The Commission permitted the carriers to file a petition for reconsideration, but denied it without opinion.

The carriers sued to enjoin the Commission's order, and the Clay Products Traffic Association and the Ports Authority intervened as defendants. The three-judge district court reversed (App. pp. 17a–35a), holding that the Commission had "enlarged the [carriers'] burden of proof in this instance, after the hear-

[5] The Commission recognized that this was the first time it had acted on a proposal to cancel a multiple-car rate (App. p. 53a).

ing was over and at the appellate level of the administrative proceeding" (App. p. 30a) by requiring a further showing of "the existence of circumstances or conditions by virtue of which [the carriers] could not reasonably be expected to achieve cost savings normally inherent in multiple-car service" (App. p. 30a).[6]

Further, the court found that the Commission had intimated that the carriers might have realized savings if they had imposed "certain service conditions" on the availability of the multiple-car rate (App. p. 30a). The court also found no "clear support" in the record for the contention, raised for the first time in the court proceeding, that it was the carriers' own operating inefficiency that was the cause of their failure to realize savings through the use of the multiple-car rate (App. pp. 31a–32a). The court also held that the "timing and manner" of the introduction of these assumptions into the Commission proceedings fell outside of the burden of proof requirement imposed by Section 15(7) (App. p. 30a). In the court's view, the underlying assumption upon which the Commission's decision rested was that the carriers' cancellation of a multiple-car rate, when the rate was no longer justified by competitive considerations, was a misuse of a "regained monopoly position" (App. pp. 30a–31a). The court found no record support for such an assumption (App. p. 32a).

The court concluded that the Commission had failed

[6] According, the court permanently enjoined the Commission's orders cancelling the filing of the single-car tariff (App. pp. 35a–36a).



to give effect to undisturbed findings of fact that would otherwise have been conclusive of the Section 15(7) proceeding, and had introduced a burden of proof on the carriers that was not "appropriate" for a Section 15(7) proceeding (App. p. 32a).

The Government did not seek review in this Court, but United States Clay Producer Traffic Association, Inc. and Georgia Ports Authority did file an appeal (No. 74–989). In a separate memorandum the Government took the position before this Court that the case presented the narrow issue of procedure of whether, having determined on exceptions from the decision of its Review Board to impose a new and additional element in the burden rail carriers must meet in order to cancel a multiple-car rate, the Commission should have given the carriers an opportunity to meet the new standard. On May 12, 1975, this Court affirmed the district court's opinion without opinion. *United States Clay Producers Traffic Ass'n., Inc.* v. *Central of Georgia R.R.*, 421 U.S. 957. (App. p. 16a).

By order served August 20, 1975, the Commission reopened its investigation docket to afford the railroads the opportunity to meet their burden as to the reasonableness of the new rates. (App. pp. 12a–13a). A subsequent petition by the railroads to the Commission to vacate this reopening was denied by the Commission by an order served November 25, 1975. (App. pp. 14a–15a).

On December 11, 1975, the railroads initiated the instant action in the district court "to compel obedience to the judgment" of the district court, arguing

that the district court's prior opinion had foreclosed a reopening. In its opinion the district court found that the reopening of this case by the Commission had violated its prior judgment, finding that the burden of proof established by the Commission was inappropriate for a Section 15(7) case on a record where there was no evidence supporting the presumption that multiple-car operations are inherently cost saving for a carrier. (App. pp. 1a–10a).

### THE QUESTIONS ARE SUBSTANTIAL

This case presents the underlying substantial issue of whether a reviewing court can properly limit the Interstate Commerce Commission's rate-making discretion by prohibiting the agency from reopening a proceeding to articulate and apply a decisional standard which in turn is based on a long understood principle of transportation economics. The lower court's action, we submit, unnecessarily limits the agency's discretion, and is in fundamental disharmony with the direction set by this court in *United States* v. *Chesapeake & Ohio R. Co.*, U.S. ; 49 L.Ed. 2d 14 (July 17, 1976), which recognizes that the Commission can tailor its rate-making standards to the particular needs of the case before it. As the issues raised in transport rate regulation become increasingly complex, flexibility of regulatory response becomes increasingly necessary. It is for this reason, we submit, that the issues raised herein become substantial.

1. The district court erred in two important ways by precluding the Commission from reopening the instant matter. First, the opinion of the court enjoining the reopening violates the fundamental principle "that the function of the reviewing court ends when an error of law is laid bare." *F.P.C.* v. *Idaho Power Co.*, 344 U.S. 17, 20. See also, *Atchison, T. & S.F. R. Co.* v. *Wichita Board of Trade,* 412 U.S. 800, 822. This is especially so in a Section 15(7) proceeding, *Arrow Transp. Co.* v. *Southern R. Co.*, 372 U.S. 658. Further, the instant case did not produce a question of the jurisdiction of the Commission which would bar further consideration by it. (App. p. 2a).



In the opinion under review here, the district court, elaborating upon its earlier opinion, stated:

> ". . . given the acceptance by the Commission of the facts found by the Review Board on this record, it cannot, without violating the statutory scheme, impose a further burden of proof of this kind upon the carriers." (App. p. 3a).

The Commission's original report did state, "We find the board's statement of the facts to be accurate and, as supplemented herein, we adopt it as our own." 340 I.C.C. at 377. However, to suggest, as did the lower court, that the Commission was thereby precluded as a matter of law from imposing an additional burden on a carrier in a rate suspension proceeding under Section 15(7) would be a serious misconstruction of what the Commission did in its original report, of the powers of the Commission to tailor the carrier's burden to the particular facts of the case, and of the right of the Commission to reopen its record to rectify factual or procedural deficiencies.

Although the Commission did adopt, with some changes, the *facts* as found, it clearly *rejected* the ultimate legal determination of the Review Board that the higher, single-car, rate would be within the zone of reasonableness. 340 I.C.C. at 386. The Commission did not adopt the full breadth of the Review Board's finding as to justness and reasonableness.

What is actually at issue here is the right of the Commission to fit an evidentiary burden to the exigencies of a particular rate proceeding before it, and the right to rectify a record to afford all affected parties in that proceeding the opportunity to meet that burden. These rights, both negated by the court below, are, we submit, fundamental elements of the Commission's discretion inherent in its rate-making jurisdiction. Rather than embodying inflexible criteria, the Commission's 15(7) powers are dynamic and can be tailored to the particular rate situation before it. *United States* v. *Chesapeake & Ohio R. Co.* U.S. ; 49 L.Ed. 2d 14 (July 17, 1976).

However, here, for reasons not completely explained in the opinion, the court below held that the tailoring of a burden with respect to multi-car rates in the factual setting of this actual rate controversy is not proper in a Section 15(7) proceeding, or at least "on this record, inappropriate for a Section 15(7) case". (App. A, p. 6a) Such a basis for its holding is a serious violation of the principle that burdens on a party in a rate case are not static concepts but can be altered when the reason for the change in policy is explained and the parties are fairly forewarned. *Atchison, T., & S.F. R. Co.* v. *Wichita Board of Trade, supra.*



As acknowledged by the Government in its pleadings before this Court in the first appeal of this matter, it is recognized that the railroads were not sufficiently advised of the additional criteria when the new burden was announced at the administrative appellate level. The Commission, however, reopened this matter, specifically to afford the railroads the opportunity to meet this burden. This right of the Commission is well recognized by this Court, and the district court should not have enjoined it in the case at bar. *United States* v. *Saskatchewan Minerals*, 385 U.S. 94; *Arrow Transp. Co.* v. *Cincinna'i, N.O. & T.P. R. Co.*, 379 U.S. 642.

The second fundamental error committed by the court below arises out of its direction that the Commission address the economics of multiple-car/single-car rate matters in other proceedings even though the actual controversy and a real fact situation is pending before it in the instant case. As this court noted in reviewing another district court's attempt to require the Commission to resolve complex rate-related questions in a separate proceeding (*American Lines* v. *L. & N.R. Co.*, 392 U.S. 571, 592):

> "Given the fact that * * * the Commission was to exercise its informed judgment in ultimately determining what method of costing was preferable, it is clear that the District Court also erred in refusing to permit the Commission to exercise that judgment in a proceeding it reasonably believed would provide the most adequate record for the resolution of the problems invloved. We can see no justification for denying the Commission reasonable latitude to de-

cide where it will resolve these complex issues, in addition to how it will resolve them. The action by the District Court here not only deprives the Commission of the opportunity to make the initial resolution of the issues but also prevents it from doing so in a more suitable context."

2. If, in holding that the new burden is "inappropriate" in this case, the court below relied on an apparent failure of the Commission to articulate a factual basis for the presumption that multiple-car rates are inherently based on cost savings, for the railroads, the district court seriously erred and cast doubt on the future use of the standard in question.[7] As early as 1939, the Commission had recognized that multiple-car shipments should be inherently cost saving to a carrier. *Molasses from New Orleans, La., to Peoria & Pekin, Ill.,* 235 I.C.C. 485, 503 (1939); see also, Ex Parte *No. 281, Increased Freight Rates and Charges,* 1972, 346 I.C.C. 88, 117 (1972).

It is submitted that the long understood concept of multiple-car rates based on cost saving operations has been sufficiently established to at least form the basis of a presumption, rebuttable by the carriers. It is noted in this regard, that it is the carriers who are uniquely aware and are decidedly the repositories of the facts which can rebut the presumption and overcome the new burden. And it is precisely because the carriers in the instant proceeding possess the relevant cost evidence as to the multi-car and single-car operations of the subject commodity in the factual setting of *this* proceeding that the lower court erred in prohibiting the reopening. The fact that the cost economics of multi-car operations were not articulated in detail by the Commission in their case hardly warrants the lower court's actions in refusing to allow the Commission to provide such articulation, and the carriers to meet justness standards as outlined by such articulation.

[7] In its original opinion, the district court questioned the basis for this presumption (App. p. 30a).



Simply put, the agency should not have been foreclosed from reopening an actual rate controversy to apply an understood transportation principle simply because it was not fully articulated at an earlier stage in the proceeding.

3. Even if the court below properly found that the Commission's presumption that multiple-car rates are inherently cost saving lacked a full factual basis, the Commission should be afforded, at the very least, the opportunity of establishing any such basis in a reopened record. *Atchison, T. & S.F. R. Co., supra.* Moreover, the Commission should be able to accomplish this in a Section 15(7) type of hearing wherein the ultimate burden will rest with the railroads which are in a unique position to prove matters regarding the efficiency of their operations under the lower multiple-car rates. This, we submit, is the proceeding which "would provide the most adequate record for the resolution of the problems involved." *American Lines* v. *L. & N.R. Co., supra,* 392 U.S. 592.

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CONCLUSION

The case at bar is significant in that it was the first response by the Commission to the situation where a carrier sought to cancel lower multiple-car rates and revert to the higher single-car rates. The burden tailored by the Commission to fit that situation was an attempt to accommodate both the shippers' needs and economics of multiple car operations. By refusing to allow the Commission to reopen this case, the district court has improperly and unnecessarily frustrated these efforts of the Commission. The questions presented are substantial, and probable jurisdiction should be noted. In the alternative, we suggest that the Court summarily reverse the district court, allowing a reopening of this case for any further reconsideration that may be appropriate.

Respectfully submitted,

ROBERT S. BURK,
*Acting General Counsel,*
CHARLES H. WHITE, JR.,
*Associate General Counsel,*
RAYMOND MICHAEL RIPPLE,
*Attorney,*
*Interstate Commerce Commission.*

SEPTEMBER 1976.

# APPENDIX A

## UNITED STATES DISTRICT COURT, DISTRICT OF COLUMBIA

Civil Action No. 2565–72

CENTRAL OF GEORGIA RAILROAD COMPANY, ET AL., PLAINTIFFS

*v.*

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL., DEFENDANTS

Before McGOWAN, Circuit Judge, and HART and PRATT, District Judges [Decided March 17, 1976]

OPINION

McGOWAN, Circuit Judge:

Plaintiff railroads have moved this court to require the Interstate Commerce Commission to comply with a judgment and injunction previously entered by this court in Central of Georgia Railroad Co., et al. v. United States, et al., 379 F. Supp. 976 (D.D.C. 1974), aff'd sub nom. United States Clay Producers Traffic Association v. Central of Georgia Railroad Co., 421 U.S. 957, 95 C.Ct. 1944, 44 L.Ed.2d 446 (1975). For the reasons set forth below, we grant the motion.

I.

The circumstances giving rise to our injunctive decree are set forth at length in our earlier opinion. They are, in brief, that in 1969 plaintiff railroads filed proposed tariff changes pursuant to Section 15(7) of the Interstate Commerce Act, 49 U.S.C. § 15(7) (1970), cancelling a multiple car rate that had been in effect since 1962. Both the Review Board and a three-member panel of the Commission, acting as an appellate division, concluded that the new rate schedule (which in effect made the existing single car rate applicable to traffic formerly moving on the multiple car rate) was, on the evidence of record, just and reasonable. The division nevertheless invalidated the newly filed schedule on the ground that the carriers had failed to show "the existence of circumstances or conditions by virtue of which they could not reasonably be expected to achieve costs savings inherent in multiple-car service." On review of the Commission's orders, this court concluded that the Commission, given its acceptance of the Review Board's findings, was without statutory authority to impose that burden of proof on the carriers; and we "ordered, adjudged, and decreed that the Commission's orders . . . are hereby permanently enjoined, set aside and nullified." 379 F.Supp. at 985.

By an order entered July 24, 1975, and served August 20, 1975, the Commission reopened the prior proceeding and ordered plaintiff railroads to show "the existence of circumstances or conditions by virtue of which they could not reasonably be expected to achieve costs savings normally inherent in multiple-car service." Plaintiff railroads, citing our earlier decision, requested the Commission to terminate the reopened proceeding. After the Commission denied that request by



an order served November 25, 1975, they filed the motion before us seeking an order requiring compliance by the Commission with out earlier decision.

II.

The Commission's justification for reopening the proceeding resides in its assertion that our opinion contemplated that that could be done for the purpose of affording the carriers an opportunity to meet the burden of proving that there are no conceivable conditions under which the multiple car rate could achieve significant cost savings. The opinion does not, either in its explicit terms or by fair inference from them, bear any such construction. Our decision turned upon the principal argument made by the carriers, namely, that, given the acceptance by the Commission of the facts found by the Review Board on this record, it could not, without violating the statutory scheme, impose a further burden of proof of this kind upon the carriers. We indicated that the Commission is free at any time under the statutory scheme, either upon complaint or its own motion, to institute a Section 15(1) investigation, 49 U.S.C. § 15(1) (1970), in which it will, of course, have the burden of proof on the issue of the justness and reasonableness of the rate now legally in effect. But the Section 15(7) proceeding has been terminated by the final judgment of this court.

The carriers' first alternative contention (in addition to the claimed violation of the statutory scheme referred to above) before us earlier was that there was no evidence in this record supporting any assumption that it was the carriers' own operating deficiencies that prevented the multiple car rate from realizing significant cost savings. We examined the

evidence of record relevant to this issue in our opinion, not because doing so was necessary to reach the result we did, but because the carriers had in effect been accused in our court, as distinct from the administrative proceeding, of bad faith. In that context we noted that: "We are not to be understood as saying that under no circumstances could considerations of this kind be relevant with respect to the termination of a multicar rate," but "that the Commission, on this record and in the face of the findings accepted by it without question, could not properly find the plaintiffs deficient in terms of the burden of proof Congress intended them to carry." 379 F.Supp. at 985. These words cannot fairly be taken to mean that this particular proceeding, ending in orders which we found invalid and permanently enjoined, can be reopened.

The second of the two alternative points made by the carriers was that, if the court should hold against them on their principal contention, then surely administrative due process required that they be given on remand an opportunity to meet the additional burden of proof which the Commission belatedly imposed upon them. We did not deal with this contention in our opinion because we had held for the plaintiffs on their first—and principal—claim, namely, that the Commission had violated the statutory scheme. What the Commission assumes now is that we authorized a remand for this very purpose—a conclusion which is wholly at odds with both our opinion and the judgment entered upon it.

For the contrary reading of our opinion now pressed by it, the Commission relies heavily upon the memorandum filed by the Solicitor General with the Supreme Court in connection with the appeal taken



only by the shippers in Central of Georgia Railroad Co. supra. The Solicitor General represented to the Court that the shippers' appeal "presents a narrow question of procedure and does not warrant plenary review by this Court." He noted that, as he put it, this court "carefully confined its holding to this particular record," and he suggested that on that record we "held that * * * the Commission erred in barring the carriers from cancelling the multiple-car rate on the basis of the new standard, which the Commission announced after the evidentiary record made under the old standards had been closed." He concluded that "[A]ccordingly, if the Commission should wish in the future to adhere to its enlarged interpretation of the burden of proof requirement imposed by Section 15(7) in the context of a proposal to cancel a multiple-car rate, it will be able to do so in a hearing in which the carriers are put on notice regarding the scope of their burden of proof." (Emphasis supplied).

In the first place, we note that the Solicitor General errs in saying that we "held" that the Commission committed a procedural error in failing, before the record closed, to afford the carriers notice of the new standard and an opportunity to meet it. The fact is that we never addressed, much less resolved, this contention, which was the third point alternatively advanced by the carriers. Second, it cannot be assumed that the Supreme Court affirmed our decision upon a ground never alluded to by us in our opinion as a basis for our ruling. The more rational speculation, if speculation in this regard is appropriate at all, would be that it affirmed our decision by reference to the explicit ground on which the decision rested. Third, the Solicitor General's language, read closely, does not say flatly that this proceeding can be re-

opened. It speaks instead of what the Commission can do "in the future," presumably meaning the next time a carrier files a cancellation of a multiple car rate.

At all events, we entered a judgment granting a permanent injunction which had the effect of terminating the Section 15(7) proceeding insofar as these parties are concerned. That judgment was not appealed by either the United States or the Commission; and it was affirmed by the Supreme Court. That proceeding is over, and the particular rate tariffs on file are legally effective. If the Commission wishes to make a new challenge to them in the form of a Section 15(1) proceeding, it can do so. What it cannot do, without violation of our final judgment, is to reopen this Section 15(7) proceeding and compel the carriers to meet the enlarged burden of proof which we held, on this record, inappropriate for a Section 15(7) case.

III.

The Commission argues that this court does not have jurisdiction to entertain plaintiffs' motion on the ground that, effective March 1, 1975, all actions to enjoin, set aside, or suspend orders of the Commission must be brought in a court of appeals.[1] But Supreme

[1] Public Law 93–584, which was enacted on January 2, 1975, amended section 2321(a) of title 28 of the United States Code to provide: "Except as otherwise provided by an Act of Congress, a proceeding to enjoin or suspend, in whole or in part, a rule, regulation, or order of the Interstate Commerce Commission shall be brought in the court of appeals as provided by and in the manner prescribed in chapter 158 of this title." Pub.L. No. 93–584, § 5, 88 Stat. 1917 (1975). Section 2342(5) of chapter 158 of title 28 places exclusive jurisdiction in the court of appeals for proceedings described in section 2321, supra. Public Law 93–584 was not to become effective until March 1, 1975. See Pub.L. No. 93–584, § 10, 88 Stat. 1917 (1975).



Court authority leaves no doubt that federal courts have continuing jurisdiction to protect and enforce their judgments. See Riggs v. Johnson County, 73 U.S. (6 Wall.) 166, 18 L.Ed. 768 (1867) ([T]he jurisdiction of a court is not exhausted by rendition of judgment, but continues until that judgment shall be satisfied. . . Process subsequent to issuance of judgment is as essential to jurisdiction as process antecedent to judgment, else the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution); Dugas v. American Surety Co., 300 U.S. 414, 428, 57 S.Ct. 515, 521, 81 L.Ed. 720, 728 (1937) ("[J]urisdiction follows that of the original suit. . .").

These cases provide firm support for our assertion of jurisdiction over this motion. The only possible source of difficulty in this regard concerns the new statute granting exclusive jurisdiction to the courts of appeal over post-March 1, 1975, actions for review of ICC orders. But the statute does not purport to limit the inherent power of three-judge district courts to enforce their final judgments in ICC cases; and we think that any purpose on the part of Congress to restrict that traditional and higly essential power would, if intended, have been clearly state by it.

The Government relies on certain language in the new statute to argue that only review proceedings pending on the effective date of the statute are excepted from the new jurisdictional scheme.[2] But that exception simply indicates a congressional intent to

[2] The language relied on provides: "[A]ctions to enjoin or suspend orders of the Interstate Commerce Commission which are pending when this Act becomes effective [March 1, 1975] shall not be affected thereby, but shall proceed to final disposition under the law existing on the date they were commenced." Pub. L. No. 93–584, § 10, 88 Stat. 1917 (1975).

permit actions that had been commenced in three-judge district courts prior to March 1, 1975, to proceed to final disposition. In light of the legislative history of the Act, we do not not think that in establishing that exception Congress also evidenced an intent to preclude three-judge district courts from asserting jurisdiction to enforce their prior final judgments. Thus, we conclude that we have jurisdiction to entertain, and indeed should entertain, the motion.

The other arguments pressed by the Government do not persuade us otherwise. The Government maintains that this is not a motion to enforce an earlier judgment of this court but rather a motion to enjoy a new ICC order, namely, an order reopening the case. But it is this very order which conflicts with and impinges upon the final judgment of this court; and the Government's point is semantical rather than substantial in relation to the issue of this court's jurisdiction to protect its own judgment.

The Government's second argument is that there is no indication that this court intended to "retain" whatever jurisdiction was necessary to insure that the Commission complied with this court's earlier decision. The Government fails to deal, however, with cases such as Riggs and Dugas, discussed above. There was no indication in Dugas, for example, that the federal court expressed an intent to "retain" jurisdiction to insure compliance with its judgment; nor is there anything in the language of the Supreme Court opinions indicating that such a requirement exists. The Government bases such a requirement on various cases in the court of appeals for this circuit, *Greater Boston Television* v. *FCC,* 143 143 U.S. App. D.C. 383, 463 F. 2d 268, 287–88 (1971) and *NLRB* v. *Wilder Manufacturing Co.,* 147 U.S. App. D.C. 152,



454 F. 2d 995, 998 (1971), as well as on a case more directly in point from the Southern District of Florida, *Keller Trucking Inc.* v. *United States,* No. 73–292–Civ–JE (Nov. 11, 1975).

The court in Keller was presented with the same jurisdictional question as is now before us. Although that court concluded that, given the new review statute, it was without jurisdiction to entertain a motion to set aside an order of the ICC, it also expressly noted that it had "previously entered no substantive order granting or denying any substantive relief." The case sub judice is quite different in that we entered a permanent injunction against the order entered by the Commission in the Section 15(7) proceeding. Greater Boston Television and Wilder are equally inapposite. Wilder did not involve a motion to enforce a prior order, and Greater Boston Television concerned the issue of judicial discretion in reopening a prior agency proceeding.

The Government's final argument against jurisdiction is a policy one: the "old system" of three-judge court review could be "perpetuated ad infinitum." The argument is more than a bit exaggerated and is obviously outweighed by the fact that there are policy arguments which cut the other way, such as the advantages to be gained in a case such as this where the panel handing down the initial decision is the best informed as to the precise scope of the initial holding.

In granting the motion, we emphasize that our prior judgment is a barrier to the Commission's reopening for the purpose of requiring plaintiff railroads to prove in this proceeding that they cannot reasonably be expected to achieve cost savings normally inherent in multiple-car service. If at any time hereafter the Commission has reason to believe that

the rates presently in effect are unjust or unreasonable, it may seek to proceed against them under Section 15(1), but the Section 15(7) proceeding now purported to be reopened has been terminated by the final judgment of this court.

Wherefore it is ordered, adjudged, and decreed that the Commission's orders served on August 20, 1975, and November 25, 1975, are declared to be in conflict with this court's prior judgment and injunction, and are, accordingly, hereby permanently enjoined, set aside, and nullified.

/s/ CARL MCGOWAN,
*Circuit Judge.*
/s/ Illegible,
*District Judge.*
/s/ J. H. PRATT,
*District Judge.*

## APPENDIX B

## IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2565–72

CENTRAL OF GEORGIA RAILROAD COMPANY, ET AL., PLAINTIFFS

*v.*

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL., DEFENDANTS

### JUDGMENT

In accordance with the opinion of this Court filed in the above-captioned case on March 17, 1976, it is:

ORDERED, ADJUDGED AND DECREED that the Commission's orders served on August 20, 1975, and November 25, 1975, are declared to be in conflict with this Court's prior judgment and injunction, and are, accordingly, hereby permanently enjoined, set aside, and nullified.

Illegible,
*Circuit Judge.*
Illegible,
*District Judge.*
Illegible,
*District Judge.*

MAY 17, 1976.

## APPENDIX C

**ORDER**

AUGUST 20, 1975

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 24th day of July, 1975.

Investigation and Suspension Docket No. 8544

CLAY, POINTS IN GEORGIA TO SAVANNAH AND PORT WENTWORTH

Upon consideration of the record in this proceeding including the report and order of the Commission in 340 I.C.C. 377, the opinion of the United States District Court for the District of Columbia in Civil Action No. 2565–72, *Central of Georgia Railroad Co., et al.* v. *United States, et al.*, and the summary affirmance by the Supreme Court of the United States of that opinion in No. 74–989, *United States Clay Producers Traffic Association, et al.* v. *Central of Georgia Railroad Co., et al.*, and

*It appearing,* That the United States District Court for the District of Columbia has determined that it was error for this Commission not to afford respondent carriers, in those instances where the carriers were seeking to cancel multicar rates voluntarily established and maintained, an opportunity to show the existence of circumstances or conditions by virtue of which they could not reasonably be expected to





achieve cost savings normally inherent in multiple car service, and good cause appearing therefor:

*It is ordered,* That this proceeding be, and it is hereby, reopened for reconsideration and further hearing under modified procedure.

*And it is further ordered,* That respondents be, and they are hereby, authorized to file a supplemental statement on or before 35 days from service of this order setting forth facts having relevance to "the existence of circumstances or conditions by virtue of which they could not reasonably be expected to achieve cost savings normally inherent in multiple-car service," and that 30 days thereafter protestants be, and they are hereby, authorized to file reply statements limited to matter set forth in the supplemental statement.

By the Commission.

[SEAL] ROBERT L. OSWALD,
*Secretary.*

## APPENDIX D

### ORDER

November 25, 1975

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D.C., on the 17th day of November, 1975.

Investigation and Suspension Docket No. 8544

CLAY, POINTS IN GEORGIA TO SAVANNAH AND PORT WENTWORTH

Upon consideration of the record in the above-entitled proceeding, including the order of the Commission served August 20, 1975, reopening this proceeding; the petition to vacate said order and discontinue the proceeding filed September 15, 1975, by respondent railroads; the reply thereto filed October 16, 1975, by U.S. Clay Producers Traffic Association, Inc.; and the order of October 2, 1975, postponing the procedural schedule pending decision on the petition to vacate; and,

*It appearing,* That sections 16(6) and 17(7) of the Interstate Commerce Act authorize the Commission to modify its decisions if appropriate; that reopening this proceeding for the purpose of receiving additional evidence conforms with the Commission's continuing jurisdiction over proceedings before it; that the three judge District Court for the District of Columbia in Civil Action No. 2565–72, *Central of Georgia Railroad Co., et al.,* v. *United States, et al.,* did not enjoin further Commission action in this matter; that the district court's decision to declare null and void and set aside the Commission's orders in this proceeding does not prohibit further consideration by the Commission relative to the court's holding that it was error not to afford the rail carriers an opportunity to show the existence of circumstances or conditions by virtue of which they could not reasonably be expected to achieve cost savings normally inherent in multiple-car service:





Wherefore:

*It is ordered,* That the petition to vacate the order served August 20, 1975, and to discontinue this proceeding be, and it is hereby, denied for the reason that sufficient grounds have not been shown to warrant granting the action sought.

*And it is further ordered,* That respondents be, and they are hereby, authorized to file a supplemental statement on or before 35 days from service of this order setting forth facts having relevance to "the existence of circumstances or conditions by virtue of which they could not reasonably be expected to achieve cost savings normally inherent in multiple-car service"; and that 30 days thereafter protestants may file reply statements limited to matter set forth in the supplemental statement.

By the Commission.

[SEAL] ROBERT L. OSWALD,
*Secretary.*

219-814—76——3

## APPENDIX E

ORDERS

May 12, 1975

No. 74–989. United States Clay Producers Traffic Assn., Inc., et al. v. Central of Georgia Railroad Co., et al. Affirmed on appeal from D.C.D.C. Mr. Justice Powell took no part in the consideration or decision of this appeal.[1] Reported below: 379 F. Supp. 976.

[1 Footnote which we have deleted relates to the fact that Mr. Justice Douglas took no part in the consideration and decision of this case.]



## APPENDIX F

## IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2565–72

CENTRAL OF GEORGIA RAILROAD COMPANY, ET AL., PLAINTIFFS

*v.*

THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION, ET AL., DEFENDANTS

Mr. Michael Boudin for the plaintiffs.
Mr. Richard J. Hardy, for intervening defendants.
Mr. Raymond M. Zimmet, for Interstate Commerce Commission and the United States of America.

Before McGOWAN, Circuit Judge, and HART and PRATT, District Judges.

OPINION

McGOWAN, Circuit Judge: Plaintiff rail carriers challenge certain orders entered by the Interstate Commerce Commission in rate proceedings under the Interstate Commerce Act, 49 U.S.C. §§ 1ff. Those proceedings are characterized by the Commission as involving "a situation which to our knowledge has not heretofore been presented for our consideration in a formal proceeding," namely, the invocation of Section 15(7) of the Act to change a tariff by terminating a

multiple-car rate.[1] The novelty of the issue has prompted the Commission to reformulate the burden of proof statutorily imposed upon a carrier initiating a rate alteration under Section 15(7), and, by reference to such revised burden, to invalidate the new schedule. In so doing, we think the Commission has failed to reflect accurately the legislative scheme of rate regulation embodied in the Act, particularly Sections 15(1) and 15(7) thereof. For the reasons set forth hereinafter, the prayer of the complaint for an injunction against the Commission's action is granted.

## I

Under the Interstate Commerce Act, as in so many regulatory statutes modeled upon it, it is the regulated utility that sets the rate in the first instance, subject always to the statutory standards of justness and reasonableness, and the avoidance of discriminatory or preferential treatment. A question of justness and reasonableness may be raised either as to a rate already lawfully in effect, or on the occasion of a proposal by the carrier to effect a change in an existing rate.

Section 15(1) is addressed to the former situation.[2]

[1] A multiple-car, or multicar, rate, as it is variously referred to, is defined by the Commission as one which applies only to a shipment tendered on one bill of lading from one consignor to one consignee at a single destination in quantities exceeding the capacity of a single car and which is lower than the contemporaneously applicable rate on the same commodity tendered in single-car quantities.

[2] Whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending



Under it the Commission may at any time, on complaint or on its own motion, initiate an investigation of the lawfulness of an existing rate; and, if it determines that such rate is in fact unlawful, it is empowered to determine and prescribe the rate, or the maximum or minimum, or maximum and minimum, thereafter to be observed. The burden of proving the unlawfulness of the existing rate rests upon the party challenging it. Although the statute does not in terms allocate the burden of proof, it has uniformly been construed as imposing that burden on the challenger of the existing rate. *Louisville & N. R. Co.* v. *U.S.*,

complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

238 U.S. 1 (1915); *Darling & Co.* v. *Alton & S. R.R.*, 299 I.C.C. 393, 398 (1956); *Colorado Milling & Elevator Co.* v. *Atchison, T. & S.F. Ry.*, 303 I.C.C. 21, 24 (1958).

Section 15(7), by contrast, is directed to the circumstance where a carrier proposes to make a change in an existing rate.[3] It provides that, whenever such a

[3] Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by



change is filed by the Commission, the latter may, upon complaint or upon its own initiative, enter upon a hearing with respect to the lawfulness of the proposed rate. Pending hearing and decision of that question, the Commission may suspend the operation of the new rate, but not for longer than seven months. Whether the hearing is completed before or after the expiration of the suspension period (at which time the carrier may begin to charge the new rate), the Commission may make such order with respect to the new rate as it could under Section 15(1) with respect to an existing rate. If the Commission has not acted before the new rate becomes effective, it may, in the case of an increased rate, enter an accounting order requiring the carrier to keep track of the additional amounts received because of the increase; and it may direct refund of such portions of the increase as it may ultimately find to be unlawful. At any hearing involving a change in the applicable rate under Section 15(7), the statute expressly places the burden of proof upon the carrier to show that the proposed change is just and reasonable.

It will be noted from the foregoing that the Commission's power to prescribe what the future rate

further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

shall be, or to set minimum and maximum limits within which a rate will be deemed to be lawful, comes into being only when the Commission has found the existing or the proposed rate, as the case may be, to be unjust and unreasonable. The provision with respect to minimum and maximum limits is also significant because it reflects the concept that there may be circumstances in which any one of several rates would be equally lawful, falling as they may within what the Supreme Court has termed "a zone of reasonableness . . . within which a carrier is ordinarily free to adjust its charges for itself." *United States* v. *Chicago, M. St. P. & P. Ry.*, 299 U.S. 499, 506 (1935); *and see Atchison, T. & S.F. R.R.* v. *Wichita Board of Trade*, 412 U.S. 800, 812–14 (1973).

The factors that enter into a determination by the Commission of justness and reasonableness have been identified in many Commission and court decisions interpreting the purposes entertained by Congress in its employment of that concept. One obvious consideration is the relationship between the rate and the cost of providing the service. A factor closely related to this is the question of whether an increased rate will result in a decline in the volume of the traffic in question by reason of the inability of the traffic to bear the increase or because other means of carriage will become available. Another area of inquiry is the extent to which the rate is justified or necessitated by competitive circumstances.

The question of who has the burden of proof on these and related issues is of critical importance. As we have seen, where the carrier is proposing a change in rate, Congress has expressly placed the burden upon it to show the justness and reasonableness of the proposed change. Contrarily, where the Commission moves to investigate the lawfulness of an existing rate



and, having found it unlawful, prescribes a new one, the burden of proof is upon those who raise the challenge to the old rate and who seek the new prescription.

## II

This controversy involves the rates charged by the plaintiff rail carriers for the transportation of kaolin clay from the Toomsboro District of Georgia to the ports of Savannah and Port Wentworth, Georgia.[4] This movement is for export, as is also a rail movement of the clay from Toomsboro to Port Royal, South Carolina. Initially the export rate to the Georgia ports was $3.50 per ton on a minimum carload weight of 30 tons. In 1961 the carriers offered a new rate of $3.34 per ton for a single-car shipment with a minimum weight of 50 tons; and in 1962 a multiple-car rate of $2.88 per ton was made available for 10 or more such cars moving at the same time from Toomsboro to the Georgia ports. This last-mentioned rate was concededly made only for the purpose of responding to the complaint of the Toomsboro shippers that they were in competition with export clay producers in South Carolina who had a $2.88 per ton single-car rate to Savannah.

Intervening general rate increases had by 1969 brought the export rates from Toomsboro to the Georgia ports to levels of $3.18 per ton for a multiple-car shipment with a minimum of 500 tons; $3.68 per ton

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[4] Kaolin clay is heavily and increasingly in demand by the paper industry for both filling and coating purposes, and to a lesser extent by the rubber industry. England supplies 70 per cent of the clay in world trade, with the United States furnishing about 15 per cent. 90% of the latter is produced in Georgia and South Carolina.

for a single-car shipment with a minimum of 50 tons; and $3.96 for single-car shipments with a minimum of 30 tons.

Port Royal, South Carolina, is a port which competes with the Georgia ports for export clay from Toomsboro. Complaint was made to the carriers in 1969 that the multiple-car rate from Toomsboro to the Georgia ports afforded the latter an undue preference, to the prejudice of Port Royal. In the course of investigating this complaint the carriers came to believe that there were no continuing competitive conditions which justified the multiple-car rate. They also purported to find that the multiple-car rate was in fact not warranted by lower operating costs, and they concluded that termination of the multiple-car rate would have no significant adverse affect on the volume of shipments from Toomsboro to the Georgia ports. For these reasons, and because of their need for additional revenues, the carriers filed tariff changes under Section 15(7) cancelling the multiple-car rate.

Protests were forthcoming from the intervening defendants in this proceeding—the Georgia Ports Authority, the operator of the port facilities at Savannah and Port Wentworth, and United States Clay Products Traffic Association, Inc., a trade association representing the Toomsboro shippers. The new tariffs were suspended for the full seven-month period, and an investigation instituted.[5] The suspension period ended after the submission of evidence and briefs but before decision, and the new tariffs become effective.[6]

[5] The case was heard on modified procedure, but there was some live testimony and cross-examination.

[6] An accounting order under Section 15(7) was eventually entered, looking toward a possible refund. The operation of this order has, however, been stayed by the Commission pending judicial review.



An examiner's report was dispensed with by the Commission, which assigned the matter to a three-member review board for initial disposition.

The review board in its report made the following findings:

> 1. Whatever competitive justification there may have been for the multiple-car rate when it was initially established, the evidence shows that currently there is no competitive need for such rate.
>
> 2. No operating or cost considerations justify the multiple-car rate. The evidence establishes that multiple-car shipments and single-car shipments are handled in essentially the same way, and there are, accordingly, no operating economies, or cost savings peculiar to the former. More switching, rather than less, is required for the multiple-car shipments, and cars used for such shipments are held by the shipper for a significantly longer period of time (3.29 days before shipment) than cars used for single shipments (1.7 days before shipment).
>
> 3. The single-car rates now applicable for what were formerly multiple-car movements are not unreasonable in relation to costs of service. The multiple-car rate exceeded variable costs, but fell short of covering the weighted average fully distributed costs. The single-car rates exceeded variable costs by 36.3 percent, and fully distributed costs by 7.6 percent, which the Board found to be not an unjust or unreasonable return.
>
> 4. The altered rates will not affect adversely the volume of export shipments from Toomsboro to the Georgia ports. There is no significant motor carrier or other competition for the hauling of such traffic. Clay exports have increased substantially during the preceding years despite increases in the multiple-car rate by reason of general rate increases. The transpor-

> tation cost to the shippers had increased some 4 percent during the previous decade as compared with a 41 percent increase in the value of the clay.

The review board dealt also with a contention that the carriers' position was inconsistent with what was said to be the claims of the plaintiff Southern Railway in *Grain in Multiple-Shipments,* 325 I.C.C. 752 (1965). The board found from the evidence that different handling practices were necessary for the clay traffic as distinguished from grain traffic, and that this explained the difference in the consequences of the respective multiple-car rates. The review board, in sum, concluded that the proposed rates were lawful in view of the findings by it from the evidence that there were no considerations of either cost or competition which justified the continuance of multiple-car rates lower than single-car rates.

Review of this decision was afforded by a three-member panel of the Commission acting as an appellate division. The division recited expressly that it found "the Board's statement of facts to be accurate and, as supplemented herein, we adopt it as our own." The division addressed itself in particular to the four critical findings of fact relied upon by the review board in concluding that the carriers had adequately met the burden of showing the justness and reasonableness of the new rate. It said, for example, that "we think it clear that if there ever was a competitive necessity for the multicar rate from the Toomsboro district, that necessity has disappeared." It found that the single-car rate "exceeds the weighted average variable cost by 98¢ and the weighted average distributed cost by 26¢, or by 36.3% and 7.6%, respectively;" and it went on to say that this rate did not "appear to be



excessive when viewed solely in relation to the cost of service." The division further said that the evidence "supports the [carriers'] contention that elimination of the multicar rate, with a consequent 50-cent increase in the rate, will not significantly impede the export clay movement." Lastly, the division said that "it is clear, as found by the review board, that no savings in clerical, switching, or other costs are in fact realized in the handling of multiple-car as opposed to single-car shipments."

The making of these findings did not, however, cause the division to reach the same result as did the review board. It concluded that the carriers had not satisfied their burden of proof for the following reason:

> ". . . Having voluntarily established and maintained reduced rates for multicar shipments, *carriers seeking cancellation must also show the existence of circumstances or conditions by virtue of which they could not reasonably be expected to achieve cost savings normally inherent, in multiple-car service.* Absent this requirement shippers and others who benefit from and have come to rely upon multicar rates would be particularly vulnerable to sudden sharp increases in rates whenever, due to cessation of competitive pressures or other reasons, carriers lost interest in continuing the high degree of operational efficiency required to effect such a savings." (Emphasis supplied.)

The division closed by saying that "there is no indication that [carriers] were prevented by internal operational difficulties from handling and tend[er]ing multiple cars as a unit;" and it added that it did not appear that "shippers or operators of port facilities were unwilling or unable to accept such tenders and

otherwise cooperate in enabling [carriers] to achieve potential cost savings."

The Commission accepted for filing the carriers' petition for reconsideration of the division's action, but eventually denied the petition without opinion. In that petition the carriers asserted that the Commission had, after the administrative hearings were finished, imposed a new requirement which was invalid as a matter of law because the "statutory obligation in a Section 15(7) proceeding was to show that the new rate was just and reasonable in light of the actual tariff conditions and operating practices and not to negate the possibility of potential costs saving under some other set of tariff conditions or operating practices." The carriers further asserted that the new requirement was based upon a factual premise that had no support in the record. Lastly, they claimed that they were, at the very least, entitled to a remand for further hearings in which they would have the opportunity to meet the burden of proof as so enlarged.

## III

It is now suggested for the first time in this court that the carriers made no effort to carry the burden of proof imposed upon them by Section 15(7). This is true, so it is said, because the carriers sought only to demonstrate that the single-car rate already in being was just and reasonable as applied to single-car traffic. We think, as did the Commission throughout the course of the proceedings before it, that the carriers were undertaking to show by evidence that the single-car rate, as applied to the traffic formerly moving under the multicar rate, was lawful. And this, it seems to us, is and must be the central issue before the Commission when the carrier acts to cancel a multicar rate,



which is precisely the action—and the only action—proposed by the plaintiffs in this case.

No one before us claims that a multicar rate once offered by a carrier must be continued by it forever, or that Section 15(7) does not provide a means by which cancellation of such a rate may be effected. The Commission did not reject the Section 15(7) filing in this case as beyond the contemplation of that statute. To the contrary, it invoked its suspension power under that provision of the Act and set the matter for hearing. Since the only proposal filed was a cancellation of the multicar rate, the purpose of that hearing was to explore the validity of the remaining single-car rates as applied to the traffic formerly moving from Toomsboro on the cancelled rate.

The carriers had, by the explicit command by the statute, the burden of proof on that issue. The hearing was focused on the factors traditionally regarded as relevant, that is to say, the reasonableness of the rate proposed to be changed in relation to costs, and its impact on the movement of export clay from Toomsboro. Findings on these questions in favor of the carriers were made by the review board and accepted by the Commission, as were also fact findings to the effect that no competitive justification for the multicar rate continued to exist nor did there appear to be any operating or cost considerations differentiating the cancelled rate from the one proposed to be applied.[7]

[7] The significance of these last-mentioned findings for the ending of a multicar rate is evident from the Commission's characterization in this case of the showing that must be made in order to get a multicar rate in the first place:

". . . Multicar rates, however, favor shippers who are able to tender large volumes of traffic at one time; and they have been allowed only in the absence of unjust discrimination

(Continued)

With these findings, the carriers would ordinarily be thought to have sustained the burden of proof imposed upon them by the statute. The Commission, however, said that "this showing of no actual savings" is not enough. It enlarged the burden of proof in this instance, after the hearing was over and at the appellate level of the administrative proceeding, to include a further showing of "the existence of circumstances or conditions by virtue of which they could not be reasonably expected to achieve cost savings normally inherent in multiple-car service." In particular, the Commission intimated that, if the carriers had imposed certain service conditions upon the availability of the multicar rate, savings might have been realized.

These are, at best, highly speculative assumptions upon which to base a belated expansion of the carriers' burden of proof; and we think that they, and the timing and manner of their intrusion into this proceeding, fall outside the Congressional contemplation of the reach of Section 15(7). This record provides no support for the premise that multicar rates are inevitably and universally characterized by significant cost savings.[8] That may or may not be the case, depending upon the conditions surrounding the

(Continued)
evidenced by a clear showing of material differences in transportation circumstances and conditions. . . . That burden has usually been satisfied by persuasive evidence of a need to meet competition and a showing of cost savings attendant upon the movement of large volumes at one time . . ."

[8] For example, in *Volume Rates on Processed Meat*, 322 I.C.C. 456 (1964), the Commission said (at 469):

"On this record, the demonstrated economies, if any, incurred in performing multiple-car service in contrast to single-car service on the instant traffic are insignificant."



particular traffic movement; and no confident answer can be forthcoming until the matter has been the subject of individual investigation.

Neither does this record afford any clear support to the contentions now made that, if savings have not in fact been realized in this case, that is due to the carriers' own operating inefficiency or failure to impose tariff conditions with respect the use by the shippers of the service.[9] The parties to this record, as we have heretofore noted, addressed themselves mainly to other questions, and these matters were touched upon only sporadically and tangentially. They have nothing like the record support necessary for the use of them made by the Commission in holding that the carriers failed to meet their burden of proof under Section 15(7).

The Commission is, of course, free at any time, upon complaint or on its own initiative, to investigate, under Section 15(1), the plaintiffs' rates and the tariff conditions or operating practices affecting them, and if it finds them unjust and unreasonable, to prescribe what they shall be for the future. In that proceeding the burden of proof, under the legislative allocation, will not be on the carriers. What the Commission cannot do without violating the statutory scheme is to

[9] The Commission's decisional response to these considerations can fairly be characterized as contemplating that cost savings could perhaps be realized if the carrier would impose a tariff condition that shippers must accept and load multicar shipments as single units, thereby presumably reducing switching and way-bill expense. A further tariff restriction should be directed to the length of time cars may be held by the shipper. The Commission did not undertake to predict what the potential savings would be, as it could not from the matter contained in the present record. Rather, it told the plaintiffs that their burden of proof extended to negating the possibility that such savings might be substantial.

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turn a Section 15(7) case into a Section 15(1) investigation by failing to give effect to the undisturbed fact findings conclusive of the former, and by holding that a burden of proof appropriate to the latter has not been met.

The flavor of the Commission's opinion, made even sharper in brief and oral argument before us by the Government and the intervening defendants, is that cancellation of a multicar rate is invariably suspect as being in bad faith. The competitive justification having disappeared, the carrier, so it is said, is misusing its regained monopoly position. There is nothing in this record to support such an inference.

Under the Commission's own approach, a multicar rate is *prima facie* suspect because it discriminates between big and little shippers, and it must be justified by competitive considerations. Once those disappear the carrier is certainly under no moral compulsion to continue a rate which, as in this case, has been found to fall short of covering the full costs of providing the service. Rail carriers may find it necessary in many cases to make rates covering only variable costs in order to retain the traffic as against other modes or to protect their shippers against competitive discrimination. The carrier who has only such rates will, over time, inevitably encounter problems of financial viability. This does not mean that a monopoly situation may be mercilessly exploited, since the carrier is a regulated monopoly and its rates must always meet the statutory standard of justness and reasonableness, as in this instance the proposed rate was explicitly found by the Commission to do. No user of the service has a vested right to anything more.

An abstract concern about monopolistic pricing cannot, accordingly, validate the Commission's action in this case. It holds the remedy for that evil in its own



hands. The Commission therefore has no tenable basis, on this record and for this reason alone, for expanding the plaintiffs' burden of proof beyond what it would normally be in a Section 15(7) proceeding.

## IV

The parties do not dispute the finding of the review board, accepted by the Commission, that, as the latter put it, "no savings in clerical, switching, or other costs are in fact realized in the handling of multiple-car as opposed to single-car shipments." What is argued to us now is that it is the plaintiffs who are responsible for this state of affairs; and support for this proposition is summoned from the Commission's statement that "there is no indication that [carriers] were prevented by internal operational difficulties from handling or tendering multiple cars as a unit," and that it does not appear that the users of the service "were unwilling or unable to accept such tenders or otherwise cooperate in enabling [carriers] to achieve potential cost savings."

Thus the Commission reiterates its earlier assertion that the case made by the plaintiffs in the administrative hearing fails because it did not anticipate and negate assumptions having no foundation in the record. We are of the view that this, at least in the context of the affirmative findings here made, does violence to the concept of the burden of proof which the proponent of a rate alteration under Section 15(7) must sustain. To the extent, however, that it may be thought that the correct resolution in this controversy turns upon what the record shows in respect of the claims now made of operational inefficiency on the part of plaintiff, we have examined that record intensively.

What first emerges from such a survey is that the parties to the hearing did not consciously address themselves to the propositions subsequently relied upon by the Commission as invalidating the proposed rate. The plaintiffs, in support of that rate, introduced evidence relating to the costs of service; and that was the issue with which the hearing was largely concerned.[10] That evidence inevitably included some description of operations. Representatives of the carriers stated that the shippers did not load and tender the cars for shipment in 10-car units, partly because they chose to use some of the cars provided to accommodate single-car domestic orders,[11] and partly because they

[10] The other major preoccupation of the hearing was the effect of the altered rate on the export movement of the clay. The Commission unequivocally accepted the finding by the review board on this question, stressing the evidence that the volume of such movement had increased steadily and dramatically throughout the prior decade despite general rate increases. The Commission concluded that the 50-cent increase (from $3.18 to $3.68 a ton) flowing from the proposed change "will not significantly impede the export clay movement." The record showed that the truck rate for clay was in excess of $6.00 per ton.

[11] Even as to movement for export, the testimony was that shippers often elected to use single-car shipments because they were more efficient for some purposes, including the meeting of ocean vessel departure dates. Thus, despite the availability of the multicar rate, approximately one-third of the export clay actually moved on single-car rates.

It was also testified that shippers load the clay at random, according to the particular grade of clay ordered and what grades are then available. After loading, the cars are, at the shipper's discretion, billed out either for export or to fill domestic orders. If a loaded car is designated for multicar export shipment, it must be held until at least nine other such cars are ready. An assistant superintendent of the plaintiff Southern Railway testified that he could recall no instance in which all 10 cars were sequentially loaded *and* tendered for shipment at the same time.



did not in the main have the storage or loading facilities required for such group loading. The result was to prevent savings in switching costs, and to increase the time the cars were in the possession of the shippers, thereby adding a cost in terms of delay in car utilization—a cost that, incidentally, falls upon other rail carriers and other shippers as well.

One shipper only testified that delays in loading were caused by the plaintiffs' failure to supply cars, its storage facilities were adequate to keep the different grades of clay separate and continuously ready for loading, and, if cars were provided, 10-car units could be loaded in one day. This testimony, however, was weakened by admissions that this shipper, being by far the largest, was not typical of the other shippers in respect of storage facilities and flexible capacity for volume handling, and that even it frequently interrupted the export loadings in order to fill domestic orders as promptly as possible.

It is also pressed upon us now that savings in clerical costs were foregone because the plaintiffs used separate waybills for each car. This, so we are told, resulted from the plaintiffs having supplied too many defective cars. The record does contain a statement by a carrier witness that separate waybills were a guard against bad-order cars. But there was also testimony to the effect that bad-orders were due not only to the age of the equipment (which assertedly did not exceed ordinary standards of utilization and wear and tear), but also by the nature of the clay itself and the tendency of some shippers to overload the cars. The highly efficient, but extremely scarce, covered hopper cars had not been used for clay because of the long periods the cars were detained at the ports. It was represented, however, the 200 new such cars were being purchased

by plaintiff Southern Railway for use in the clay traffic.

There were, of course, no findings made by the Commission with respect to any of these matters; and, indeed, on this markedly imprecise state of the record, findings of any real value would have been difficult to make. The fact appears to be that the parties did not try the case before the examiner by reference to the theory on which the Commission later decided it, and which the Government and the protestants urge upon us now. We are not to be understood as saying that under no circumstances could considerations of this kind be relevant with respect to the termination of a multicar rate. What we do hold is that the Commission, on this record and in the face of the findings accepted by it without question, could not properly find the plaintiffs deficient in terms of the burden of proof Congress intended them to carry.

WHEREFORE, it is ordered, adjudged, and decreed that the Commission's orders respectively served on January 4, 1972, May 9, 1972, and December 11, 1972, are hereby permanently enjoined, set aside and nullified.

CARL MCGOWAN,
*Circuit Judge.*
GEORGE HART,
*District Judge.*
JOHN H. PRATT,
*District Judge.*

AUGUST 7, 1974.



# IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2565–72

CENTRAL OF GEORGIA RAILROAD COMPANY, ET AL.,
PLAINTIFFS
*v.*
THE UNITED STATES OF AMERICA
AND
THE INTERSTATE COMMERCE COMMISSION, ET AL.,
DEFENDANTS

## JUDGMENT

In accordance with the opinion of this Court filed in the above-captioned case on August 7, 1974, it is:

ORDERED, ADJUDGED AND DECREED that the Commission's orders respectively served on January 4, 1972, May 9, 1972, and December 11, 1972, are hereby permanently enjoined, set aside and nullified.

[Illegible],
*Circuit Judge.*
[Illegible],
*District Judge.*
[Illegible],
*District Judge.*

OCTOBER 9, 1974.

## APPENDIX G

## IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2565–72

CENTRAL OF GEORGIA RAILROAD COMPANY, ET AL.,
PLAINTIFFS

*v.*

UNITED STATES OF AMERICA
AND
INTERSTATE COMMERCE COMMISSION, ET AL.,
DEFENDANTS

### NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Interstate Commerce Commission, defendant herein, hereby appeals to the Supreme Court of the United States from the Opinion and Order of this Court filed March 17, 1976, and Judgment filed May 17, 1976.

This appeal is taken pursuant to 28 U.S.C. § 1253.

ARTHUR J. CERRA,
*General Counsel.*

/s/ Raymond M. Ripple
RAYMOND MICHAEL RIPPLE,
*Attorney,*
*Interstate Commerce Commission,*
*Washington, D.C. 20423.*
*Attorneys for the Interstate Commerce Commission*





### CERTIFICATE OF SERVICE

I hereby certify that on this, the fifteenth day of July, 1976, I served true and accurate copies of the foregoing Notice of Appeal to the Supreme Court of the United States on counsel for all parties of record by first-class mail, postage prepaid.

/s/ Raymond Michael Ripple
RAYMOND MICHAEL RIPPLE,
*Attorney.*

## APPENDIX H

## IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2565–72

CENTRAL OF GEORGIA RAILROAD COMPANY, ET AL., PLAINTIFFS

*v.*

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

---

### NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

---

Notice is hereby given that the United States of America, defendant herein, hereby appeals to the Supreme Court of the United States from the Opinion and Judgment of this Court filed on March 17, 1976, and May 17, 1976, respectively.

This appeal is taken pursuant to 28 U.S.C. § 1253.

THOMAS E. KAUPER,
*Assistant Attorney General,*
/s/ Lloyd John Osborn
LLOYD JOHN OSBORN,
*Attorney,*
*Department of Justice,*
*10th & Constitution Ave., N.W.,*
*Washington, D.C. 20530.*

EARL J. SILBERT,
*United States Attorney.*





### CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of July, 1976, I served true copies of the foregoing Notice of Appeal on counsel for all parties of record by first class mail, postage prepaid, as follows:

Raymond M. Ripple, Esquire, Office of General Counsel, Interstate Commerce Commission, 12th St. & Constitution Avenue, N.W., Washington, D.C. 20423.

Richard J. Hardy, Esquire, Hardy & Chapman, 425 13th Street, N.W., Suite 1212, Washington, D.C. 20004.

Michael Boudin, Esquire, 888 16th Street, N.W., Washington, D.C. 20006.

James L. Tapley, Esquire, Southern Railway Company, 920 15th Street, N.W., Washington, D.C. 20005.

Neill W. McArthur, Jr., Esquire, Seaboard Coast Line Railroad, 500 Water Street, Jacksonville, Florida 32202.

Earl J. Silbert, United States Attorney, Room 3600–E U.S. Courthouse, 3rd & Constitution Avenue, N.W., Washington, D.C. 20001.

/s/ Lloyd John Osborn
LLOYD JOHN OSBORN.

# APPENDIX I

## TEXT OF STATUTES INVOLVED

### INTERSTATE COMMERCE ACT

### § 15 (49 U.S.C. § 15)

(1) Whenever, after full hearing, upon a complaint made as provided in section 13 of this title, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in section 1 of this title, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial; or otherwise in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the





carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation of practice so prescribed.

* * * * *

(7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with

reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts are paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

## APPENDIX J

Served January 4, 1972

30594

## INTERSTATE COMMERCE COMMISSION

Investigation and Suspension Docket No. 8544

CLAY, POINTS IN GEORGIA TO SAVANNAH AND PORT WENTWORTH

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Decided December 22, 1971

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On reconsideration, proposed cancellation of multiple-car rates on export shipments of kaolin clay from certain Georgia points to Savannah and Port Wentworth, Ga., found not shown to be just and reasonable. Schedules ordered canceled and proceeding discontinued.

*Peter S. Craig, Charles B. Evans,* and *James L. Tapley* for respondents.

*Richard J. Hardy, Sam H. Lloyd,* and *Kenneth G. Crowl* for protestants.

REPORT OF THE COMMISSION ON RECONSIDERATION DIVISION 2, ACTING AS AN APPELLANT DIVISION, COMMISSIONERS WALRATH, JACKSON, AND BREWER

WALRATH, *Commissioner:*

The modified procedure was followed. In the prior report (not printed). decided November 2, 1970, Review Board Number 4 found just and reasonable a proposed cancellation of a multiple-car rate on export shipments of kaolin clay from certain Georgia points to Savannah and Port Wentworth, Ga. Upon consideration of a petition filed by the protestants,[1] to which the respondents replied, we reopened the proceeding for reconsideration on the present record by our order of March 29, 1971. Since the board's report was not printed, the principal facts will be restated. We find the board's statements of facts to be accurate and, as supplemented herein, we adopt it as our own.

The proceeding arises from a proposed cancellation by the respondent railroads, Central of Georgia Railway Company, Sandersville Railroad Company, Seaboard Coast Line Railroad Company, and Southern Railway Company, hereinafter referred to as the Central, Sandersville, Seaboard, and Southern; of their existing multicar rate[2] on export shipments of kaolin clay, minimum weight per shipment 500 tons, and minimum weight per car 100,000 pounds, from clay

[1] The U.S. Clay Producers Traffic Association, Inc., and the Georgia Ports Authority.

[2] A multicar rate is one which applies only to a shipment tendered on one bill of loading from one consignor to one consignee at a single destination in quantities exceeding the capacity of a single car and which is lower than the contemporaneously applicable rate on the same commodity tendered in single-car quantities.



pits in the so-called "Toomsboro district"[3] of Georgia to Savannah and Port Wentworth.[4]

Upon protest by U.S. Clay and the Georgia Ports Authority, the proposal was suspended to and including October 13, 1970. The cancellation of the multicar rate became effective on October 14, 1970, upon expiration of the suspension period. Higher single-car rates became applicable on this traffic contemporaneously upon cancellation of the mutlicar rate. For convenience, the multicar rate which was in effect prior to the effective date of the schedules under investigation will be referred to as the present rate, while the single-car rates which became applicable on multicar shipments upon cancellation of the multicar rate will be referred to as proposed rates.

Prior to October 27, 1958, the rail export rate on Kaolin clay from Bath and Langley, S.C. (hereinafter called Bath-Langley), and the Toomsboro district of Georgia to Savannah were equalized at $3.50, minimum weight 60,000 pounds.[5] On October 27, 1958, the rate from Bath-Langley was reduced to $3, minimum 60,000 pounds, but no reductions were made from other producing points. The rail rate from Bath-Langley was reduced because the principal movement was from a plant not served by rail, and the shipper had the expense of trucking the clay to a warehouse for subsequent rail movement.

[3] Includes Huber, Gordon, McIntyre, Gardner, Wrens, Stapleton, Sandersville, Stevens Potters, Kaolin, Dry Branch, Toomsboro, Pikes Peak, Hephzibah, and Macon.

[4] Savannah and Port Wentworth are grouped for ratemaking purposes.

[5] Rates, costs, and differences in rates and costs are stated in amounts per net ton of 2,000 pounds. The record was made based on rates at the Ex Parte No. 262 level.

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On February 23, 1961, rates were established on a minimum weight of 100,000 pounds, based on 92½ percent of the 60,000-pound rates, and resulted in rates of $2.88 from Bath-Langley, and $3.34 from other producing points to Savannah.

In July 1962, the Seaboard published an export rate of $2.88, minimum 100,000 pounds per car in lots of 10 cars or more from Dry Branch to Savannah to enable the shipper at Dry Branch to compete in the export market. This multicar rate was on the same level as the single-car rate from Bath-Langley to Savannah. Prior to this July 1962 adjustment by Seaboard, the rates from Georgia origins were $3.60 minimum 60,000 pounds, and $3.34, minimum 100,000 pounds. Upon establishment from Dry Branch by the Seaboard of the $2.88 multicar rate, the Central, Sandersville, and Southern followed suit from origin points on their respective lines. As a result of general increases, the $2.88 multicar rate became $3 in 1968, and $3.18 in 1969. The multicar minimum has been changed from an absolute requirement of 10 cars at one time to a minimum of 500 tons per shipment. The present (Ex Parte No. 262) rates from the Toomsboro district to Savannah are: multicar, $3.18, minimum 500 tons; single car, $3.68, minimum 100,000 pounds; and singe car, $3.96, minimum 60,000 pounds.

Export kaolin clay also moves to the South Carolina ports of Charleston and Port Royal from Georgia origins. There are no multicar rates on kaolin clay to South Carolina ports from Georgia origins. The carriers have received requests to extend the multicar rates to South Carolina ports and this brought about the instant proposal.

Kaolin clay is a fine, white powdery product used by the paper industry primarily as a filler in the body



of paper and as a coating on the surface of paper. It is also used to a lesser extent by the rubber industry. Although widely distributed throughout the world, large deposits of good quality kaolin clay conveniently situated for commercial exploitation are relatively few. The most important commercial source is the Cornwall district of England, which supplies about 70 percent of the kaolin clay moving in the world trade. Currently, United States producers supply about 15 percent of the kaolin moving in world trade. Ninety percent of the kaolin in the United States comes from Georgia and South Carolina.

The export movement of clay has grown substantially since the multicar rate was established in 1962. In 1961, a year prior to the establishment of the multicar rate, U.S. Clay's members shipped 34,313 tons of clay from Georgia origins to Savannah for export. In 1963, the year following the establishment of the multicar rate, the movement had increased to 74,455 tons and it has continued to increase each successive year. In 1969, U.S. Clay's members shipped 245,171 tons of clay to Savannah, an increase of more than 700 percent compared to 1961. The average value of export clay has also increased over this period. In 1959 the average value per ton of export clay was $21.49. In 1970 this had increased to a value of $30.37 a ton, reflecting an increase over the 1959 value of 41 percent.

Respondents' practice has been to prepare individual waybills for each car used in the involved multicar service and cars are switched and tendered to shippers individually rather than in "blocks" or as a unit. Similarly, clay shippers load and retender cars moving under the multicar rate on an individual rather than a unit basis. Although at least some shippers are capable of loading 500 tons sequentially into

10 cars in 1 day, they have not been asked to do so by respondents.

The respondents' principal justifications for the proposed cancellation are that there is no competitive necessity for the retention of the multicar rate; that the carriers are in need of additional revenue; that there are no operating or cost considerations which justify the lower rates; and that the present multicar rate is generally below variable costs.[6]

The protestants, on the other hand, oppose the cancellation on the grounds that there are operating and cost considerations which justify the lower rate and that the respondents' cost presentation is unreliable and does not measure the costs experienced under the actual circumstances of the movement. They refer to the respondents' own claims of operating economies achieved by handling multicar shipments which were made in pleadings submitted in support of the "Big John" multiple-car rates on grain in *Grain in Multiple-Car Shipments—River Crossings to So.*, 325 I.C.C. 752.

Protestant Georgia Ports Authority owns and operates, at Savannah, docks and warehouse facilities for handling general cargo, which represent an investment in excess of $40.5 million. It presently has under con-

[6] The term "out-of-pocket" costs is used in the parties' exhibits and statements but the terminology has been changed to "variable" costs to accord with the Commission's decision in *Rules to Govern Assemblies & Presenting Cost Evidence*, 337 I.C.C. 298. The terms contain nearly the same element of cost and for the purpose of this proceeding are synonymous.



struction a new modern bulk handling facility at a cost of approximately $10 million for the purpose of handling dry bulk commodities, the most prominent being clay from Georgia origins. When a feasibility study was being prepared to determine whether this facility should be constructed, it was concluded that it would be necessary to handle 1 million net tons of dry cargo annually to make construction of the facility economically feasible. The predominant movement on which the feasibility was determined was an estimated 435,000-ton annual export movement of bulk clay. This protestant is of the view that if the estimated movement of bulk clay should deteriorate to a drastically lesser amount, the bulk handling facility will prove to be not economically sound, and the Authority will not reach the break-even point on its investment.

U.S. Clay asserts that cancellation of the multicar rate would work a substantial injustice on numerous shippers of volume bulk materials who have invested millions of dollars and built their operations around volume rates related to the economies of voume movement. U.S. Clay argues that if the railroads can here cancel the multicar rate they can do the same with respect to multicar rates on grain and coal, which now move hundreds of millions of tons annually, and leave the shippers who depend on those rates without recourse.

The tables below show the respondents' variable and fully distributed costs as restated by the board:

TABLE 1.—*Restated variable costs per ton for the movement of clay from various Georgia origins to Savannah and North Savannah, Ga.*

| | Restated cost per ton | Tons handled | Percent of total tons | Weighted cost per ton |
|---|---|---|---|---|
| To Savannah: | | | | |
| McIntyre | $2.66 | 30,870 | 27.7 | $0.74 |
| Gordon | 2.72 | 9,350 | 8.4 | .23 |
| Huber | 2.75 | 4,381 | 3.9 | .11 |
| Gardner | 2.23 | 1,068 | .9 | .02 |
| Sandersville | 2.36 | 770 | .7 | .02 |
| Kaolin | 2.36 | | | |
| To north Savannah: | | | | |
| McIntyre | | | | |
| Gordon | 2.52 | 1,605 | 1.4 | .04 |
| Huber | 2.90 | 1,636 | 1.5 | .04 |
| Gardner | | | | |
| Sandersville | | | | |
| Kaolin | 2.70 | 61,860 | 55.5 | 1.50 |
| Weighted average variable cost per ton | | | | 2.70 |

TABLE 2.—*Restated fully distributed cost per ton for the movement of clay from representative Georgia origins to Savannah and North Savannah, Ga.*

| | Restated variable cost per ton | Constant costs per ton | Fully distributed costs | Tons handled | Percent of total tons | Weighted fully distributed cost per ton |
|---|---|---|---|---|---|---|
| To Savannah: | | | | | | |
| McIntyre | $2.66 | $0.68 | $3.34 | 30,870 | 27.7 | $0.93 |
| Gordon | 2.72 | .67 | 3.39 | 9,350 | 8.4 | .28 |
| Huber | 2.75 | .75 | 3.50 | 4,381 | 3.9 | .14 |
| Gardner | 2.23 | .60 | 2.83 | 1,068 | .9 | .03 |
| Sandersville | 2.36 | .69 | 3.05 | 770 | .7 | .02 |
| Kaolin | 2.36 | .74 | 3.10 | | | |
| To north Savannah: | | | | | | |
| McIntyre | | | | | | |
| Gordon | 2.52 | .71 | 3.23 | 1,605 | 1.4 | .05 |
| Huber | 2.90 | .80 | 3.70 | 1,636 | 1.5 | .06 |
| Gardner | | | | | | |
| Sandersville | | | | | | |
| Kaolin | 2.70 | .75 | 3.45 | 61,860 | 55.5 | 1.91 |
| Weighted average fully distributed cost per ton | | | | | | 3.42 |



DISCUSSION

The past decade has seen a rapid growth in the use of multicar rates at levels lower than single-car rates applicable on the same traffic. Multicar rates, however, favor shippers who are able to tender large volumes of traffic at one time; and they have been allowed only in the absence of unjust discrimination evidenced by a clear showing of material differences in transportation circumstances and conditions. *Coal to New York Harbor Area*, 311 I.C.C. 355, *Huron Portland Cement Co.* v. *B. & O. R. Co.*, 332 I.C.C. 655. That burden has usually been satisfied by persuasive evidence of a need to meet competition and a showing of cost savings attendant upon the movement of large volumes at one time, as in the *"Big John"* case, *supra*.

The instant proposal, however, goes contrary to that trend in that proponents seek to *cancel* a multicar rate, a situation which to our knowledge has not heretofore been presented for our consideration in a formal proceeding. A threshold question, therefore, concerns respondents' burden of proof.

As noted, the involved multicar rate has been in effect and has been relied upon by shippers for nearly a decade. As a practical matter, upon cancellation, these shippers will be required to pay the single-car (minimum 100,000 pounds) rate of $3.68 per net ton in lieu of the present multicar rate of $3.18, representing a rate increase of 50 cents per ton.

Although respondents presented evidence in support of their proposal, they contend such evidence was unnecessary since they had no burden to prove that the resulting single-car rates would be just and reasonable for multicar shipments. They argue that multicar rates are, by definition, discriminatory because they provide a shipper with a discount for tendering a large ship-

ment which is not provided to a shipper tendering freight in single-car lots; and that here the discrimination is not justified because: (1) there is no competitive necessity for retention of a discount rate, and (2) no cost savings experienced by them in the movement of large volumes of clay at one time as opposed to single-car shipments. Respondents' therefore made a motion that the proceeding be dismissed on the ground that it is *per se* just and reasonable to eliminate discrimination by cancellation of the multicar rate.

While respondents' rationale traditionally has provided a basis for disapproval of multicar rates *when initially filed,* that is not the situation here. Having been voluntarily put into effect by respondents, the involved volume rate created an incentive to shippers and others to gear their operations and facilities to accommodate large tenders of freight at one time; and over the years the reduced rate level has become a significant factor in the movement of kaolin clay for export. The latter considerations, along with all other relevant circumstances and conditions surrounding the subject traffic (including the level of the single-car rates which will take effect upon cancellation), must be taken into account in our determination of whether the proposal is just and reasonable; and, under section 15(7) of the act, it is incumbent upon respondents, as proponents of a change in a rate or practice, affirmatively to meet this full burden of proof. The motion is denied.

From the evidence adduced we think it clear that if there ever was a competitive necessity for the multicar rate from the Toomsboro district, that necessity has disappeared. We note, however, that contrary to the contention of respondents, the multicar rate is shown to exceed variable costs (table 1) by amounts ranging from approximately 28 to 95 cents and it exceeds the



weighted variable cost of $2.70 by 48 cents. This variance between the cost showing and respondents' stated objective in filing the proposed cancellation supplement merely suggests a possibility that the filing may have been prompted by a misapprehension. It does not, in itself, affect our determination of whether the cancellation is just and reasonable since, absent special circumstances, carriers are under no compulsion to establish or maintain rates at or even near the lowest level of compensativeness.

The single-car rate of $3.68 which will apply upon cancellation of the present multicar rate ($3.18) exceeds the weighted average variable cost by 98 cents and the weighted average fully distributed cost by 26 cents, or by 36.3 percent and 7.6 percent, respectively. This return, although high, does not appear to be excessive when viewed solely in relation to the cost of service. See *General Motors Corp* v. *New York Central R. Co.*, 311 I.C.C. 622, 625, and *Commodity Credit Corp.* v. *Texas & P. Ry. Co.*, 306 I.C.C. 525, 533. However, the reasonableness of the single-car rate as such is not at issue in this proceeding. That rate for many years has existed alongside the multicar rate and has been used. Rather, the basic issue before us is whether the single-car (100 ton) rate, applied to traffic now moving in minimum shipments of 500 tons at one time under the multicar rate, is shown to be just and reasonable. This relational aspect of respondents' burden of proof is implicit in the term *"changed rate"* as used in section 15(7) of the act.

In support of their claim that the traffic will move unimpeded on the highest single-car rates respondents have shown that an increasing amount of export clay from Georgia origins is moving through a recently completed facility at Port Royal, S.C., near Savannah, at the single-car rate of $3.68. In 1968, Southern par-

ticipated in the movement of 692 cars, 38,205 tons, of clay to Port Royal. In 1969, however, Southern participated in the movement of 2,111 cars, 119,200 tons, to Port Royal. This was a 300-percent increase, and it took place under the same single-car rates the respondents seek to apply to Savannah. The respondents claim that the growth of traffic at Port Royal under the single-car rate proves that the traffic to Savannah will also move unimpeded under the same single-car rate. On the other hand, a traffic manager for a principal clay shipper testified that the dock operator at Port Royal absorbs the 50-cent difference between the single-car rate to Port Royal and the multicar rate to Savannah, and the result, as far as the shippers are concerned, is that the clay to Port Royal is handled under a net rate which is the same as the multicar rate to Savannah.

This witness also testified that the reduction in the transportation costs to shippers which resulted from the establishment of the multicar rate in 1962 was an important factor in the growth of the movement of clay for export and that the elimination of that rate would be a significant deterrent to his company's ability to continue the expansion it has enjoyed since 1962.

TABLE 3.—*Clay from Georgia origins to Savannah*

| | Single-car rates | | Multicar rates | |
|---|---|---|---|---|
| | 30-ton minimum | 80-ton minimum | 500-ton minimum | Tons |
| 1961 | $3.60 | $3.34 | | 34,313 |
| 1962 | 3.60 | 3.34 | $2.88 | 45,837 |
| 1963 | 3.60 | 3.34 | 2.88 | 72,455 |
| 1964 | 3.60 | 3.34 | 2.88 | 87,047 |
| 1965 | 3.60 | 3.34 | 2.88 | 94,498 |
| 1966 | 3.60 | 3.34 | 2.88 | 133,816 |
| 1967 | 3.60 | 3.34 | 2.88 | 167,680 |
| 1968 | 3.74 | 3.47 | 3.00 | 243,201 |
| 1969 | 3.96 | 3.68 | 3.18 | 245,171 |



The data in the above table shows that the movement of export clay has steadily increased each successive year and that the increases in tonnage occurred even in those years when the shippers were subjected to increases in the rates. For example, the single-car and multicar rates were increased in 1968 and again in 1969, but those increases were no deterrent to the increased tonnages shipped in those years. The multicar rate was increased by 30 cents between 1967 and 1969, yet the movement increased by more than 77,000 tons despite such increase in the rates. This evidence, in our opinion, supports the respondents' contention that elimination of the multicar rate, with a consequent 50-cent increase in the rate, will not significantly impede the export clay movement. The increased value of clay since 1959 also adds some support to respondents' position that the traffic will bear the higher rates. In this proceeding, however, we do not consider those circumstances to be determinative in light of the considerations hereinafter stated.

As noted above, a principle justification for the establishment of multicar rates has been cost and operating economies made possible by moving multiple cars as a unit. For example, railroad respondents in the *"Big John"* case, *supra,* including Southern and Seaboard, claimed that five-car consignments entailed one-fifth of the station clerical expense and about 50 percent of the terminal and interchange switching expense incurred in handling single-car movements.[7]

On this record, however, there is considerable evidence concerning respondents actual operations; and it

[7] Applied to the involved traffic, this suggests a savings in station clerical expense of $6 per car (or 11 cents per ton) and $10 per car (or 18.4 cents per ton) for the average 55-ton load on multicar movements to Savannah, or a total saving of 29.4 cents per ton.

is clear, as found by the review board, that no savings in clerical, switching, or other costs are in fact realized in the handling of multiple-car as opposed to single-car shipments. A separate waybill is prepared for each car used in the movement of this clay traffic irrespective of whether it is used in single-car or multicar service, and cars used in the latter service are not susceptible of being loaded or switched at one time since they are not tendered as a unit.

But this showing of no actual savings, in itself, does not satisfy respondents' burden of proof. Having voluntarily established and maintained reduced rates for multicar shipments, carriers seeking cancellation must also show the existence of circumstances or conditions by virtue of which they could not reasonably be expected to achieve cost savings normally inherent in multiple-car service. Absent this requirement shippers and others who benefit from and have come to rely upon multicar rates would be particularly vulnerable to sudden sharp increases in rates whenever, due to cessation of competitive pressures or other reasons, carriers lose interest in continuing the high degree of operational efficiency required to effect such savings.

In this proceeding there is no indication that respondents were prevented by internal operational difficulties from handling and tendering multiple cars as a unit. Nor does it appear that shippers or operators of port facilities were unwilling or unable to accept such tenders and otherwise cooperate in enabling respondents to achieve potential cost savings.

On reconsideration we find that the proposed cancellation of the multicar rate on export shipments of kaolin clay from the Toomsboro district of Georgia to Savannah and Port Wentworth would result in single-car rate levels which are not shown to be just and reasonable for multicar shipments.



COMMISSIONER BREWER was absent and did not participate.

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*It is ordered,* That respondents herein be, and they are hereby, notified and required to cancel, on or before February 5, 1972, the schedules described in the order of the Commission's Board of Suspension, dated March 11, 1970, upon not less than 1 day's notice to this Commission and to the general public by filing and posting in the manner prescribed by the Commission under section 6 of the Interstate Commerce Act, and that this proceeding be, and it is hereby, discontinued.

By the Commission, Division 2 Acting as an Appellate Division.

(SEAL)
340 I.C.C.

ROBERT L. OSWALD,
*Secretary.*

## APPENDIX K

This report will not be printed in the permanent series of Interstate Commerce Commission reports.
Service Date November 5, 1970.

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## INTERSTATE COMMERCE COMMISSION

Investigation and Suspension Docket No. 8544

CLAY, POINTS IN GEORGIA TO SAVANNAH AND PORT WENTWORTH

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Decided November 2, 1970

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Proposed cancellation of multiple-car rates on export shipments of kaolin clay from certain Georgia points to Savannah and Port Wentworth, Ga., found just and reasonable. Proceeding discontinued.

*Peter S. Craig, Charles B. Evans,* and *James L. Tapley* for respondents.

*Richard J. Hardy, Sam H. Lloyd,* and *Kenneth G. Crowl* for protestants.

REPORT AND ORDER OF THE COMMISSION
REVIEW BOARD NUMBER 4

MEMBERS BROWN, ROCK, AND FITZPATRICK

BY THE BOARD:

Due and timely execution of our functions under section 15(7) of the Interstate Commerce Act impera-





tively requires the omission of a report and recommended order of the hearing examiner. The proceeding has been assigned to this Board for disposition.

By schedules filed to become effective March 14, 1970, and later, the respondent railroads, Central of Georgia Railway Company, Sandersville Railroad Company, Seaboard Coast Line Railroad Company, and Southern Railway Company, hereinafter referred to as the Central, Sandersville, Seaboard, and Southern, proposed to cancel their existing multiple car (hereinafter called multicar) rate [1] on export shipments of kaolin clay, minimum weight per shipment 500 tons, and minimum weight per car, 100,000 pounds, from clay pits in the so-called "Toomsboro" district [2] of Georgia to Savannah and Port Wentworth, Ga.[3]

Upon protest by the U. S. Clay Producers Traffic Association, Inc. (U.S. Clay) and the Georgia Ports Authority, the Commission, by order of its Board of Suspension, suspended the proposed schedules to and including October 13, 1970, and instituted this investigation into their lawfulness. The cancellation of the multi-car rate become effective on October 14, 1970, upon expiration of the suspension period. Higher single-car rates became applicable on this traffic contemporaneously upon cancellation of the multi-car

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[1] A multi-car rate is one which applies only to a shipment tendered on one bill of landing from one consignor to one consignee at a single destination in quantities exceeding the capacity of a single car and which is lower than the contemporaneously applicable rate on the same commodity tendered in single-car quantities.

[2] Includes Huber, Gordon, McIntyre, Gardner, Wrens, Stapleton, Sandersville, Stevens Pottery, Kaolin, Dry Branch, Toomsboro, Pikes Peak, Hephzibah, and Macon.

[3] Savannah and Port Wentworth are grouped for rate-making purposes.

rate. For convenience, the multicar rate which was in effect prior to the effective date of the schedules under investigation will be referred to as the present rate, while the single-car rates which became applicable on multi-car shipments upon cancellation of the multi-car rate will be referred to as proposed rates.

The proceeding was directed to be handled under the modified procedure. Evidence in the form of verified statements was presented by the respondents in support of the proposal and by protestants in opposition thereto. The modified procedure has been supplemented by an oral hearing before a hearing examiner for the purpose of cross-examination of certain respondents' witnesses and for the receipt of rebuttal evidence responsive to the cross-examination and such other pertinent evidence that the examiner would deem necessary to complete the record. Briefs have been filed by the respondents and jointly by protestants U.S. Clay and Georgia Ports Authority. Requested findings not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

A brief history of the rates will contribute to understanding the issues and the dispute between the parties.

Prior to October 27, 1958, the rail export on kaolin clay, hereinafter sometimes called clay, from Bath and Langley, S.C. (hereinafter called Bath-Langley), and the Toomsboro district of Georgia to Savannah were equalized at $3.50, minimum weight 60,000 pounds.[4]

[4] Rates and differences in rates are stated in amounts per net ton of 2,000 pounds. The record was made based on rates at the Ex Parte No. 262 level. Therefore, when reference is made herein to "present rates", those rates include the Ex Parte No. 262 increase. Unless otherwise indicated, they do not include



On October 27, 1958, the rate from Bath-Langley was reduced to $3.00, minimum 60,000 pounds, but no reductions were made from other producing points. The rail rate from Bath-Langley was reduced because the principal movement was from a plant not served by rail and the shipper had the expense of trucking the clay to a warehouse for subsequent rail movement.

On February 23, 1961, rates were established on a minimum weight of 100,000 pounds based on 92½ percent of the 60,000 pound rates, and resulted in rates of $2.88 from Bath-Langley, and $3.34 from other producing points to Savannah.

In July, 1962 the Seaboard published an export rate of $2.88, minimum 100,000 pounds per car in lots of 10 cars or more from Dry Branch to Savannah to enable the shipper at Dry Branch to compete in the export market. This multi-car rate was upon the same level as the single-car rate from Bath-Langley to Savannah. Prior to this July, 1962 adjustment by Seaboard, the rates from Georgia origins were $3.60, minimum 60,000 pounds, and $3.34, minimum 100,000 pounds. Upon establishment from Dry Branch by the Seaboard of the $2.88 multi-car rate, the Central, Sandersville, and Southern followed suit from origin points on their respective lines. As a result of general increases, the $2.88 multi-car rate became $3.00 in 1968 and $3.18 in 1969. The multi-car minimum has been changed from an absolute requirement of 10 cars at one time to a minimum of 500 tons per shipment. The present rates from the Toomsboro district to Savannah (at the Ex Parte No. 262 level) are: multi-

(but are subject to) the Ex Parte No. 265 increase. The increases authorized in Ex Parte No. 265 are the subject of a further investigation now being conducted by the Commission.

car, $3.18; minimum 500 tons; single car, $3.68, minimum 100,000 pounds; and single car, $3.96, minimum 60,000 pounds. Upon the cancellation of the present multi-car rate of $3.18, the kaolin clay traffic will move on the normal single-car rates, with the bulk of the traffic moving on the single-car rate of $3.68, minimum 100,000 pounds.

Export kaolin clay also moves to the South Carolina ports of Charleston and Port Royal from Georgia origins. There are no multi-car rates on kaolin clay to South Carolina ports from Georgia origins. The carriers have received requests to extend the multi-car rates to South Carolina ports and this brought about the instant proposal.

Kaolin clay is a fine, white powdery product used primarily as a filler in the body of paper and as a coating on the surface of paper by the paper industry. It is also used to a lesser extent by the rubber industry. Although widely distributed throughout the world, large deposits of good quality kaolin clay conveniently situated for commercial exploitation are relatively few. The most important commercial source is the Cornwall district of England, which supplies about 70 percent of the kaolin clay moving in the world trade. Currently, United States producers supply about 15 percent of the kaolin moving in the world trade. Ninety percent of the kaolin in the United States comes from Georgia and South Carolina.

The export movement of clay has grown substantially since the multi-car rate was established in 1962. In 1961, a year prior to the establishment of the multi-car rate, U.S. Clay's members shipped 34,313 tons of clay from Georgia origins to Savannah for export. In 1963, the year following the establishment of the multi-car rate, the movement had increased to 72,455



tons and it has continued to increase each successive year. In 1969, U.S. Clay's members shipped 245,171 tons of clay to Savannah, an increase of more than 700 percent compared to 196[illegible].

The average value of export clay has also increased over this period. In 1959 the average value per ton of export clay was $21.49. In 1970 this had increased to a value of $30.37 a ton, reflecting an increase over the 1959 value of 41 percent.

The protestants maintain that the establishment of the multi-car rate enabled them to penetrate the European market, and that the tremendous growth in export shipments is attributable to the multi-car rate. They further maintain that the multi-car rate, being approximately 86 percent of the single-car rate, is reasonably related to the single-car rate; that the Commission has recognized that an increase in the volume of traffic should operate to reduce rates; and that the multi-car rate is adequately compensatory.

Protestant Georgia Ports Authority owns and operates, at Savannah, docks and warehouse facilities for handling general cargo, which represent an investment in excess of $40.5 million. It presently has under construction a new modern bulk handling facility at a cost of approximately $10 million for the purpose of handling dry bulk commodities, the most prominent being clay from Georgia origins. When a feasibility study was being prepared to determine whether this facility should be constructed it was concluded that it would be necessary to handle 1 million net tons of dry cargo annually to make construction of the facility economically feasible. The predominant movement on which the feasibility was determined was an estimated 435,000-ton annual export movement of bulk clay. This protestant is of the view that if the estimated move-

ment of bulk clay should deteriorate to a drastically lesser amount, the bulk handling faciliy will prove to be not economically sound, and the Authority will not reach the break-even point on its investment.

U.S. Clay asserts that cancellation of the multi-car rate would work a substantial injustice on numerous shippers of volume bulk materials who have invested millions of dollars and built their operations around volume rates related to the economies of volume movement. U.S. Clay argues that if the railroads can here cancel the multi-car rate they can do the same with respect to multi-car rates on grain and coal, which now move hundreds of millions of tons annually, and leave the shippers who depend on those rates without recourse.

As stated, upon cancellation of the present multi-car rate of $3.18, the bulk of the traffic will move on the single car rate of $3.68. Thus the effect of the proposed cancellation will be that the shippers will be subjected to a rate increase of 50 cents per ton.

Under section 15(7) of the act the burden of proof is upon the respondents to show that the proposed increased rate is just and reasonable. At the beginning of the oral hearing counsel for the respondents took the position that respondents had no burden to prove that the proposed single car rates would be just and reasonable for multiple car shipments. They maintained that multi-car rates are, by definition, discriminatory because they provide a shipper with a discount for tendering a large shipment which is not provided to a shipper tendering freight in single-car lots. Counsel argued that such multi-car rates are lawful only if they are justified by reason of competition, lower costs in handling as compared to single-car shipments, or some other transportation condition, and that when railroads voluntarily seek to eliminate discrimination



by canceling multi-car rates there is no provision in the Interstate Commerce Act to prevent this. Respondents further took the position that since there was no obligation upon them to maintain multi-car rates and there is no contention by the protestants that the single-car rates are unjust and unreasonable for single-car shipments, it is unnecessary as a matter of law to submit evidence in support of such tariff change. The railroads' counsel therefore made a motion that the proceeding be dismissed on the ground that it is *per se* just and reasonable to eliminate discrimination by cancellation of the multi-car rates. Nevertheless, the railroad respondents presented evidence in support of the proposal and, in their brief, they maintain that it is an academic question as to whether they are required to present evidence in support of the justness and reasonableness of the proposed rate, because they maintain they have borne their burden of proof by submitting such evidence. They therefore specifically state that ". . . respondents' motion that the proceeding be dismissed is not pressed."[5] Accordingly, we shall proceed to consider this case on the merits.

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[5] The respondents' position on this point is specifically delineated in a footnote on page 25 of their brief which reads as follows:

"It becomes academic whether respondents might have met their burden of proof by means of a far more limited showing than they presented. Therefore respondents' motion (R.22) that the proceeding be dismissed on the ground that it is *per se* just and reasonable to eliminate discrimination is not pressed. A complete record has been made and the Commission will undoubtedly rely upon the whole of it. The Commission should await an appropriate case in which to rule upon the subject of that motion, and that would be a case in which a carrier chooses, without further justification than its reliance upon the removal of discrimination, to offer no further proofs. That is not the situation in this proceeding."

The respondents offered the following principal justifications for the proposed cancellation of the multi-car rate:

(1) There is no competitive necessity for the retention of the multi-car rate.

(2) The carriers are in need of additional revenue and the traffic will move unimpeded on the higher single-car rate.

(3) There are no operating conditions or cost considerations which justify lower rates on multi-car shipments than on single-car shipments.

(4) The present multi-car rate is generally below the variable costs [6] and the single-car rate will be just and reasonable considering costs and rate comparisons.

The evidence and arguments presented by the respondents in support of, and by the protestants in rebuttal to each of the above listed justifications will be considered in order.

The respondents contend that if there ever was a competitive necessity for establishing the multi-car rates from the Toomsboro district that necessity has disappeared. They refer to the history of the rate adjustments on clay originating from the Toomsboro district, discussed earlier in this report. As set forth in that rate history, prior to October 27, 1958, the rail export rates on clay to Savannah from Bath-Langley, S.C., and the Toomsboro, Ga. district, were equalized. When the rate from Bath-Langley was reduced to $3.00, minimum 60,000 pounds, to accommodate a shipper at Bath-Langley, who had the expense of trucking to the rail line, no reductions were made from other producing points. However, in July 1962 the Seaboard published a multi-car export rate from Dry Branch (one of the Toomsboro origins) on the same level as the single-car rate from Bath-Langley to enable the Dry Branch shipper to compete in the export market, and this reduced multi-car rate was also established at the same time from the other origins in the Toomsboro district. The respondents represent that if it was originally thought that the first multi-car rate publication was competitively necessary, the multi-car rate is no longer necessary to compete with movements from Bath-Langley. In support thereof the respondents presented testimony of a witness to show that the type of clay produced in the Bath-Langley area is different from and not competitive with the type of clay produced in the Toomsboro district. This witness, a director of the Commerce Marketing and Planning Department of Southern Railway System, testified that the clay originating in the Toomsboro district is used primarily by the paper industry and the Bath-Langley clay by the rubber industry, and that as the clays have different end uses there is no competition between the Bath-Langley clay and the Toomsboro clay for export.

U.S. Clay challenges the respondents' contention of lack of competitive justification, maintaining that there is "significant competition between Bath-Langley and Georgia clay, but presented no substantial evidence to rebut the respondents' contention.[7] In fact,

[6] The term "out-of-pocket" costs is used in the parties' exhibits and verified statements, but the terminology has been changed herein to "variable" costs to accord with the Commission's decision in *Rules to Govern Assembling & Presenting Cost Evidence*, 337 I.C.C. 298. The terms contain nearly the same elements of cost and for the purpose of this proceeding are synonymous.

[7] U.S. Clay's witness, testifying that there is a significant overlap in the use of clay, stated "In the year 1969, for example, 6,190 tons of clay produced by Huber (a clay shipper) at its South Carolina plants was sold for use in the paper industry. In the same year we shipped 35,000 tons of clay from our

(Continued)

a witness for the protestant conceded that the clay produced at Bath-Langley is *primarily* used in the rubber industry, and that produced in Georgia is *primarily* used in the paper industry. The record indicates that the railroads do not encounter any motor carrier competition in the movement of this traffic. We believe that the evidence supports the respondents' contention that there is no competitive necessity for the retention of the multi-car rate.

The respondents' claim that they are in need of additional revenue on this traffic is tied in with their contention that the present rate is generally below costs. That contention will be considered in the discussion of the cost evidence which occurs later in this report. In support of its claim that the traffic will move unimpeded on the higher single-car rate, the respondents show that an increasing amount of export clay from Georgia origins is moving through a recently completed facility at Port Royal, S.C., near Savannah, at the single-car rate of $3.68. In 1968, Southern participated in the movement of 692 cars, 38,205 tons, of clay to Port Royal. In 1969, however, Southern participated in the movement of 2,111 cars, 119,200 tons, to Port Royal. This was a 300 percent increase, and it took place under the same single-car rates the respondents seek to apply to Savannah. The respondents claim that the growth of traffic at Port Royal under the single-car rate proves that the traffic to Savannah will also move unimpeded under the same single-car rate. On the other hand, a traffic manager

(Continued)

Langley plants for export." It is observed, however, that the South Carolina plants furnishing clay for use in the paper industry are not identified, and no mention is made of the end use of the 35,000 tons of clay shipped from the Langley plant for export.



for a principal clay shipper testified that the dock operator at Port Royal absorbs the 50-cent difference between the single-car rate to Port Royal and the multi-car rate to Savannah, and the result, as far as the shippers are concerned, is that the clay to Port Royal is handled under a net rate which is the same as the multi-car rate to Savannah.

This witness also testified that the reduction in the transportation cost to shippers which resulted from the establishment of the multi-car rate in 1962 was an important factor in the growth of the movement of clay for export and that the elimination of that rate would be a significant deterrent to his company's ability to continue the expansion it has enjoyed since 1962.

In the following table are shown the applicable rates for the years beginning with 1962, when the multiple-car rate was first established, through 1969; and the tonnage shipped in each of those years by protestant U. S. Clay's members from Georgia origins to Savannah for export:

TABLE 1.—*Clay from Georgia origins to Savannah*

| | Single-car rates | | Multicar rates, 500-ton minimum | Tons |
|---|---|---|---|---|
| | 80-ton minimum | 50-ton minimum | | |
| 1961 | $3.60 | $3.34 | | 34,313 |
| 1962 | 3.60 | 3.34 | $2.88 | 45,837 |
| 1963 | 3.60 | 3.34 | 2.88 | 72,455 |
| 1964 | 3.60 | 3.34 | 2.88 | 87,047 |
| 1965 | 3.60 | 3.34 | 2.88 | 94,498 |
| 1966 | 3.60 | 3.34 | 2.88 | 133,816 |
| 1967 | 3.60 | 3.34 | 2.88 | 167,680 |
| 1968 | 3.74 | 3.47 | 3.00 | 243,201 |
| 1969 | 3.96 | 3.68 | 3.18 | 245,171 |

The data in the above table show that the movement of export clay has steadily increased each successive year and that the increases in tonnage occurred even

in those years when the shippers were subjected to increases in the rates. For example, the single- and multi-car rates were increased in 1968 and again in 1969, but those increases were no deterrent to the increased tonnages shipped in those years. The multi-car rate was increased by 30 cents between 1967 and 1969, yet the movement increased by more than 77,000 tons despite such increase in the rates. This evidence, in our opinion, supports the respondents' contention that elimination of the multi-car rate, with a consequent 50-cent increase in the rate, will not significantly impede the export clay movement. The increased value of clay since 1959 also adds some support to respondents' position that the traffic will bear the higher rates.

The principal justification for establishing and maintaining multi-car rates is that operating economies are achieved in handling shipments in multi-car lots which warrant lower rates on such shipments than on single-car shipments. The respondents insist, however, that on this traffic there are no operating or cost considerations which justify lower rates on multi-car shipments than on single-car shipments. This is disputed by the protestants.

The protestants refer to the Southern's own claims of operating economies achieved by handling multi-car shipments which were made in pleadings submitted in support of its "Big John" multiple-car rates on grain in *Grain in Multiple-Car Shipments—River Crossings to So.*, 325 I.C.C. 752, popularly called the "Big John" case. They maintain that the principal economies achieved in volume handling are in the station clerical expense (1 versus 10 waybills) and in terminal and intermediate switching expense per car, which is reduced by the larger number of cars per switch. They point out that the Southern, in its support of the rates in the "Big John" case, claimed that five-car consignments entailed one-fifth of the station clerical expense incurred on single-car movements. Protestants contend that this suggests a savings in cost on the considered movements of $6 per car or approximately 11 cents per ton for the average 55-ton load on multi-car movements to Savannah. They also point out that Southern claimed a reduction of approximately 50 percent in terminal and interchange switching expense in handling multiple versus single car shipments in the "Big John" case, and they argue that if the same savings were enjoyed on the 500-ton shipments here, the reduction on a representative movement would be approximately $10 per car, or 18.4 cents per ton for a 55-ton movement. The sum of estimated savings is 29.4 cents per ton.



These estimated cost savings are based on the assumption that the respondents handle the waybilling and switching of the cars used in multi-car shipments of this clay traffic in the same manner in which the Southern stated it handled waybilling and switching of cars in multi-car shipments of grain in the "Big John" case. This assumption, however, finds no support in the instant record. The respondents concede that if a single waybill were issued for all cars used in a multi-car shipment that some station clerical expense would be saved; and that if multi-car shipments were tendered in blocks of cars so that the block could be delivered in one movement to its track and switched in one movement there would be a saving in engine time and this saving would be reflected in a decrease in the cost of switching. Testimony presented by respondents, however, establishes that multi-car shipments are not handled in the foregoing manner. A separate waybill is prepared for every car used in the movement of this

clay traffic irrespective of whether it is to be in a single car shipment or in a multicar shipment. This practice is followed in the event any car should become "bad ordered" and must be pulled out for repairs. While a multi-car shipment of clay requires only one bill of lading, this is ordinarily prepared by the shipper and there is no significant cost savings to the carriers.

Savings in switching costs are possible on multi-car shipments of coal and grain because the shippers are able to load in consecutive order carloads of these commodities with the same grade of grain or coal. The general practice is to switch a requisite number of cars into a shipper's facility for loading on a continuous basis, and switch them out in a single block of cars. Those cars stay together and are delivered in a similar in-and-out switch operation. This does not happen with respect to the clay shipments moving on multi-car rates. Witnesses for the respondents explain that clay shippers do not receive and load all the cars comprising a multiple-car shipment at one time.

Clay is produced in a variety of grades. At some points it is stored in silos and then loaded into rail cars from those silos. At other producing points storage silos are not maintained and cars are loaded direct from production facilities. Also, even where silos are maintained, cars are often loaded direct from production facilities. The practice of the shippers is to load the cars at random depending upon the grade of clay being ordered and being produced or available at that time in storage silos. The loading of multiple cars for export is interspersed with loading of single cars of export and domestic shipments. Consequently, a multi-car shipment is accumulated over several days. In actual operations, therefore, multi-car shipments require more switching than single-car shipments because it takes the shipper more than a single day to load approximately 10 cars for a 500-ton shipment. For example, a shipper will load 4 or 5 cars of a multi-car export shipment along with single-car domestic shipments. As the outbound shipments are pulled at the end of the day, the 4 or 5 loaded cars comprising part of a multi-car shipment are not "ordered out" by the shipper but are ordered to be "re-set" or returned, which requires that such cars must be returned to the plant after being switched out with the outbound single-car shipments, to be held for the accumulation of a sufficient number of cars to make up a multi-car shipment. The result is more switching than is performed on normal shipments.



The movement from Kaolin, Ga., on the Sandersville Railroad accounts for more than one-half of the total multi-car shipments to Savannah. Based on a study made by that railroad during the period from April 15 to April 30, 1970, cars moving on multi-car rates were held an average of 3.29 days before shipment, while cars moving on single-car rates were held an average of 1.7 days.

The multi-car rate and the 50-ton single-car rate have the same service conditions, including the same standard demurrage provisions, and the same free time at the ports. The same equipment with the same per-car minimum is used for both multi-car and single-car shipments.

The respondents did not submit separate cost studies for multi-car movements and single-car movements because, as stated above, they claim that, from an operating standpoint, there is no difference in the handling of individual cars which make up a multi-car shipment on multi-car rates for export, as opposed to single cars

of clay for export on single car rates, except that the necessity to accumulate 500 tons to obtain the multi-car rate results in delays to equipment that are not encountered on single-car shipments. The costs developed by the respondents for the movement of clay from the Toomsboro district to Savannah therefore makes no distinction between multi-car shipments and single-car shipments; the respondents maintain that the costs are the same whether the movement is multi-car or single-car.

### RESPONDENTS' COST EVIDENCE

Respondents developed unit costs by the separate applications of Rail Form A to the annual report expense and statistical data for the Central (using 1969 data) and for the Seaboard (using 1968 data). The Sandersville Railroad is a Class II railroad, and as such is not required to maintain a separation of its accounts and statistics. Therefore, application of Rail Form A to its annual report data was not possible. Consequently, Rail Form A Costs, Southern Region, 1968 were used to represent the costs for that portion of the movement on the Sandersville. All costs were updated to March 31, 1970, using the Commission's Cost Finding Section's procedure. Certain adjustments were made in the unit costs to more accurately reflect the costs of the considered movement.

The following table shows the variable costs developed by respondents for the movement of clay from representative origins to Savannah and North Savannah, Ga.



TABLE 2.—*Variable costs for the movement of clay from various origins to Savannah and North Savannah, Ga.*

| Origins | Variable cost per ton | Tons handled | Percentage of total tons | Weighted cost per ton |
|---|---|---|---|---|
| To Savannah: | | | | |
| McIntyre | $3.30 | 49,917 | 32 | $1.06 |
| Gordon | 3.10 | 17,838 | 12 | .37 |
| Huber | 3.12 | 10,196 | 7 | .22 |
| Gardner | 2.53 | 5,070 | 3 | .08 |
| Sandersville | 2.97 | 5,733 | 4 | .12 |
| Kaolin | 3.36 | 167 | 0 | .00 |
| To North Savannah: | | | | |
| McIntyre | | | | |
| Gordon | 2.89 | 1,605 | 1 | .03 |
| Huber | 3.32 | 1,776 | 1 | .03 |
| Gardner | | | | |
| Sandersville | | | | |
| Kaolin | | | | |
| Weighted average variable cost per ton | 3.13 | 61,860 | 40 | 1.26 |
| | | | | 3.16 |

The respondents also developed fully distributed costs[*] from the same origins to North Savannah and Savannah which range from $3.13 per ton to $4.12 per ton, with a weighted average fully distributed cost of $3.86 per ton.

The costs developed by the respondents reflect the following adjustments:

2. Train weights and trailing tons.
3. Car costs.
4. Tare weight.
5. Weight of lading.
6. Empty return ratio.

#### 1. SWITCH ENGINE MINUTES

Actual switching minutes were developed by respondents through individual field studies covering

[*] The term "fully distributed costs" includes all costs, both variable and constant. It also includes, however, overall carrier

(Continued)

origin and destination switching. The studies reflect the handling of multiple-car cuts being pulled from the clay plants.

2. STUDY OF TRAIN WEIGHT AND TRAILING TONS

This study was an 18-day study. Respondents maintain that it is representative as it was selected on a random basis; it covers an entire year plus a consistent number of like days which eliminates any seasonal variation. Protestants made no criticism of this adjustment.

3. CAR COSTS

An extensive turnaround study was made by the respondents covering several hundred cars from seven representative origins.[9] Generally, the turnaround time averaged 12 to 16 days.

Another turnaround study was made by the respondents which covered several hundred cars in multi-car shipments from the Sandersville Railroad to the Seaboard Coast Line in Savannah, and single-car shipments from Sandersville Railroad to the Seaboard Coast Line at Port Royal. The study developed virtually the same turnaround time for the multi-car movements as for the single-car traffic.

Respondent developed a daily freight train car cost

(Continued)

revenue requirements, and, as such, is not, strictly speaking, descriptive of a level of true costs. Instead it represents a blend of costing and ratemaking. See *Rules to Govern Assembling & Presenting Cost Evidence* 337 I.C.C. 298, 325. Because the completed Rail Form A and Working papers were not submitted into evidence we cannot ascertain on this record the non cost elements.

[9] McIntyre, Gordon, Huber, Gardner, Sandersville, Kaolin, and Dry Branch.



of $4.45. This is a composite figure derived on the basis that: (1) 65 percent of the export traffic will hereafter move in new 50-ton boxcars (purchased at a cost of $14,500 each) which according to respondents produces a cost of $5.12 per day, and (2) 35 percent will be handled in existing equipment which, as of April 1970, produces a cost of $3.53 per day. Respondents represent that the average cost per day will be $4.45.[10]

4. TARE WEIGHT

Respondents developed an average tare weight of 27.0 tons on the basis that 65 percent of the traffic would be handled in new cars with a tare weight of 28.5 tons and the remaining traffic in present equipment with a tare weight of 24.1 tons.

5. WEIGHT OF LADING

Respondents used the average weight of lading for all export traffic, including those cars moving under rates subject to 30-ton and 50-ton single-car rates, which resulted in an overall average lading of 51.87 tons per car.

6. EMPTY RETURN RATIO

An empty return ratio of 100 percent was used by respondents.

PROTESTANTS' CRITICISMS OF RESPONDENTS' COSTS

Protestants contend that respondents cost evidence is next to worthless, that it does not measure the costs experienced under the actual circumstances of the

[10] Sixty-five (65) percent of $5.12 plus 35 percent of $3.53 equals approximately $4.55, not $4.45, as computed by the respondents.

movement, but it is based on a series of unrealistic assumptions and predications. The principle items which the protestants criticize are:

1. Car costs.
2. Weight of lading.
3. Tare weight.
4. Empty return ratio.
5. Station clerical.
6. Terminal switching.

### 1. CAR COSTS

Protestants object to the $4.45 car cost per day developed by respondents as previously described.

The $5.12 per day factor used for 65 percent of the traffic assumes that new cars will be acquired by the Southern for dedicated use in the movement of export clay. This assumes that the new car service rules prohibit the use of foreign line equipment which had accounted for 65 percent of the cars used for the export movement. Protestants contend there is no basis on this record to conclude that the operation of the new car service rules, when and if they become effective, will lead to the acquisition of a new fleet of cars for the handling of 65 percent of the export clay traffic, and that the new car service rules merely provide penalties for the policing of regulations which have been in effect for many years. Protestants also pointed to the fact that none of respondents' witnesses had considered what beneficial effects the new car service rules might have insofar as aiding in the return of Southern Railway equipment, which has been used for loading, to foreign line points.

It was further shown by protestants that respondents erred by assuming that the cars to be acquired



would be 50-ton boxcars costing $14,500, since this is the cost of 50-foot, 70-ton cars. The use of such cars, of course, would tend to increase the average load and would, accordingly, lower the costs per ton.

Also, the protestants argue that if new equipment were to be acquired for the accommodation of export clay traffic it would only be 100-ton covered hoppers. A witness for respondents agreed that clay shippers not only could, but would, prefer to load 100-ton covered hoppers for their bulk traffic. This would also bring about a very substantial reduction in railroad cost.

The protestants also criticize $3.53 per day cost for cars which respondents assume will be used for 35 percent of the traffic. That cost represents the average current per diem used by the Southern for *all* classes of traffic, and protestants insist that it is not appropriate for cars used in the transportation of this clay traffic.

The protestants conducted a study of 444 cars shipped by three principal exporting clay producers in January 1940. By reference to the master per diem list protestants determined the currenty effective weighted average per diam applicable to these cars to be $2.94. They submit that this figure, rather than the respondents' composite figure of $4.45 per day, should be used for car cost.

### 2. WEIGHT OF LADING

Protestants criticize the fact that respondents used the average weight of lading for all export traffic, including that moving under rates subject to 30-ton and 50-ton single-car rates, rather than the average weight of load for multi-car shipments. Respondents' computation results in an average lading of 51.87 tons

per car, instead of 55.05 tons' average lading of cars shipped under multiple-car rates, which was developed by protestants from data in respondents' study.

### 3. TARE WEIGHT

Here, again, protestants contend that since respondents assumed that 65 percent of the traffic would be handled in new 28.5-ton cars and the remaining traffic in present equipment with a tare weight of 24.1 tons, the average tare weight of 27.0 tons used by respondents is overstated.

### 4. EMPTY RETURN RATIO

Respondents' use of a 100 percent empty return ratio, according to protestants, assumes that the cars used for the export clay movement would be exclusively dedicated to that service. Protestants claim that they made a study which showed that only a small percentage of the boxcars loaded outbound to Savannah were returned empty. However, they concede that some of those loaded cars may have been returned empty to other clay origins not covered by protestants' study, and the percentage of empty return for the industry as a whole may be larger than its study showed. But, according to protestants, it is inappropriate to assume a 100 percent empty return unless the cars are in dedicated service. They urge that a more acceptable empty return ratio is .476, which is the Southern Region average empty return ratio for boxcars."

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" Source—Statement No. 6-69, "Ratios of Empty to Loaded Freight Car-Miles by Type of Car and Performance Factors for Way, Through and All Trains Combined." published by the Commission's Cost Finding Section.



### 5. STATION CLERICAL

Protestants believe that respondents have overstated station clerical expenses on multi-car shipments by assuming that each car will be separately billed, as are shipments under single-car rates. As previously indicated, protestants refer to the "Big John" rates on 450-ton shipments of grain (I&S 7656), wherein the Southern Railroad claimed that 5-car consignments entailed one-fifth of the station clerical expense incurred on single car movements. Thus, protestants believe there is a cost savings of about $6.00 per carload (80% of $7.59 per car) or about 11 cents per ton for the 55-ton load for multi-car movements to Savannah.

### 6. TERMINAL SWITCHING

The out-of-pocket costs of $28.77 per car developed by respondents for the cost of orginating traffic on the Sandersville Railroad is simply not credible, according to protestant. This cost is higher than the average total expense per car incurred on Sandersville's traffic in the year 1969. The 1969 annual report of that railroad shows that it handled 26,353 loaded freight cars in 1969, an average of 6 miles per car. Its railway operating expenses were $618,238. Applying 6 percent to its depreciated investment ($1,695,849) indicates $101,751 to yield a 4 percent return after taxes. Adding this return factor to the operating expenses, rents and taxes, indicates a total expense of $719,989 ($618,238 + $101,751). Thus, $719,989 divided by 26,353 cars, results in an average cost of $27.32 per car.

## DISCUSSION AND CONCLUSIONS

In our consideration of the cost evidence submitted in this proceeding we have accepted some of the respondents' adjustments and rejected others. The adjustments we have accepted relate to the switch engine minutes, train weights and trailing tons, and the empty return ratio. The switch engine minutes, train weight and trailing tons adjustments were based on studies made by respondents and were not objected to by protestants, except to the origin switching cost applicable to the Sandersville Railroad portion of the clay movement.

The empty return ratio of 100 percent, used by respondents, is acceptable. It is unlikely that the empty return ratio for the cars involved in the clay traffic would be the same as the Southern Region average of 47.6 percent, which is urged by the protestants. Respondents in a study of foreign clay cars terminating at Savannah developed an actual empty return ratio of 224.38 percent, which further supports the acceptance of the respondents' use of 100 percent empty return ratio.

We accept the respondents' argument that no savings in waybill expense is realized on the multi-car shipments here considered because a separate waybill is prepared for each car. Even though station clerical expenses entail more than just issuing waybills, we have not adjusted this item, as the costs related to shipments where savings would be made on multi-car movements are so small that no significant effect would be made in respondents' costs.

The cost issues that we believe are pertinent in this proceeding are car costs, tare weight, average lading weight, and origin terminal costs on the Sandersville Railroad. Based on our conclusions with respect thereto we have restated respondents' costs.



### A. CAR COSTS

The car costs of $2.94 per day as developed by protestants are more acceptable than the $4.45 developed by respondent. The $2.94 per car cost per day pertains to the cars actually used for the multi-car export clay shipments. There is no indication of how much the average car costs have increased, if at all, since protestants' study of January 1970. Respondents' costs of $4.45 were previously discussed and it appears this is a hypothetical cost and is not proper for use in this proceeding.

### B. TARE WEIGHT

We have used a tare weight of 25.9 tons in restating respondents' costs. In their computation of the costs, the respondents used a tare weight of 27.0 tons based on their estimate that 65 percent of the traffic will be handled in new 28.5-ton cars. We believe the tare weight of 27.0 tons is overstated because there is no substantial evidence that 65 percent of the traffic will be handled in new 28.5-ton cars. The tare weight of 25.9 tons, which is the average tare weight for general service boxcars shown in public statement No. 5–69, *Rail Carload Cost Sales by Territories for the Year 1967,* published by the Commission's cost finding section, represents in our judgment a reasonable tare weight for computing the costs of this traffic.

### C. WEIGHT OF LADING

Respondents' use of average weight for all export traffic, including that moving under rates subject to 30-ton and 50-ton single car rates, is improper and results in an overstatement of costs. The average weight should have been based on the loads for multi-car shipments. Thus respondents improperly assumed a lading

of 51.87 tons per car, instead of the 55.05 tons average lading of cars shipped under multiple-car rates, which we regard as proper.

### D. TERMINAL COST-ORIGINS ON SANDERVILLE RAILROAD

Respondents used Southern Region costs for that portion of the clay movement on the Sandersville Railroad. The method employed in costing the Sandersville Railroad movement results in assigning out-of-pocket costs of $28.77 per car for origin terminal cost on that road, which is higher than the system average expense (including both variable and constant) of $27.32 per car incurred on all Sandersville Railroads' traffic for the year 1969.

As explained earlier in this report, Sandersville Railroad is a Class II rail carrier and is not required to maintain a separation of its accounts and statistics. Consequently, it is not possible on this record to accurately compute the actual origin terminal costs for those origins on the Sandersville Railroad and therefore we have not adjusted this item in our restatement. However, in view of the fact that the average Southern Region variable origin terminal cost of $28.77 per car is higher than Sandersville Railroad's system average cost for 1969, it appears that this item is somewhat overstated, although the amount of overstatement is not determinable on this record.

In table 3 below we have restated the variable costs and in table 4, the fully distributed costs:



TABLE 3.—*Restated variable costs per ton for the movement of clay from various Georgia origins to Savannah and North Savannah, Ga.*

| | Restated cost per ton | Tons handled | Percent of total tons | Weighted cost per ton |
|---|---|---|---|---|
| To Savannah: | | | | |
| McIntyre | $2.66 | 30,870 | 27.7 | $0.74 |
| Gordon | 2.72 | 9,350 | 8.4 | .23 |
| Huber | 2.75 | 4,381 | 3.9 | .11 |
| Gardner | 2.23 | 1,068 | .9 | .02 |
| Sandersville | 2.36 | 770 | .7 | .02 |
| Kaolin | 2.36 | | | |
| To north Savannah: | | | | |
| McIntyre | | | | |
| Gordon | 2.52 | 1,605 | 1.4 | .04 |
| Huber | 2.90 | 1,636 | 1.5 | .04 |
| Gardner | | | | |
| Sandersville | | | | |
| Kaolin | 2.70 | 61,860 | 55.5 | 1.50 |
| Weighted average variable cost per ton | | | | 2.70 |

TABLE 4.—*Restated fully distributed cost per ton for the movement of clay from representative Georgia origins to Savannah and North Savannah, Ga.*

| | Restated variable cost per ton | Constant costs per ton | Fully distributed costs | Tons handled | Percent of total tons | Weighted fully distributed cost per ton |
|---|---|---|---|---|---|---|
| To Savannah: | | | | | | |
| McIntyre | $2.66 | $0.68 | $3.34 | 30,870 | 27.7 | $0.93 |
| Gordon | 2.72 | .67 | 3.39 | 9,350 | 8.4 | .28 |
| Huber | 2.75 | .75 | 3.50 | 4,381 | 3.9 | .14 |
| Gardner | 2.23 | .60 | 2.83 | 1,068 | .9 | .03 |
| Sandersville | 2.36 | .69 | 3.05 | 770 | .7 | .02 |
| Kaolin | 2.36 | .74 | 3.10 | | | |
| To North Savannah: | | | | | | |
| McIntyre | | | | | | |
| Gordon | 2.52 | .71 | 3.23 | 1,605 | 1.4 | .05 |
| Huber | 2.90 | .80 | 3.70 | 1,636 | 1.5 | .06 |
| Gardner | | | | | | |
| Sandersville | | | | | | |
| Kaolin | 2.70 | .75 | 3.45 | 61,860 | 55.5 | 1.91 |
| Weighted average fully distributed cost per ton | | | | | | 3.42 |

Our restatement of the casts shows that, contrary to the respondents' contention, the present multi-car rate exceeds the variable cost (Table 3) by amounts ranging from approximately 28 to 95 cents. The present multi-car rate exceeds the weighted variable cost of $2.70 by 48 cents. However, when compared to the restated fully distributed costs, shown in Table 4, the multi-car rate fails to cover such costs in most instances and fails to cover the weighted average fully distributed cost of $3.42 by 24 cents.

The single car rate of $3.68 which will apply upon cancellation of the multi-car rate exceeds the weighted average variable cost by 98 cents, and exceeds the weighted average fully distributed cost by 26 cents. As previously explained, these costs are, to some extent, overstated because they reflect origin terminal costs of the Southern Region, which overstates somewhat the actual origin terminal costs of the Sandersville. Also, as previously noted, the restated fully distributed costs contain some non-cost elements which we could not eliminate in our restatement because the underlying work papers were not made a part of the record. However, the overstatements would not be large and are not material to the disposition of this proceeding. The Commission has held that rates which substantially exceed fullcosts are not, on that account in excess of a maximum reasonable level. See *General Motors Corp.* v. *New York Central R. Co.*, 311 I.C.C. 622, 625, and *Commodity Credit Corp.* v. *Texas & P. Ry. Co.*, 306 I.C.C. 525, 533.[12] The reason for this is

[12] In the *Commodity Credit Corp. case* rates exceeding out-of-pocket [variable] costs by amounts ranging from 157.9 to 583.2% were found not shown to be unreasonably high. In *Morrison-Knudson Co., Inc.* v. *Missouri Pac. R. Co.*, 308 I.C.C. 205, 209, rates alleged to be 141 percent of fully distributed costs and 259 percent of out-of-pocket [variable] costs were found not shown to be unreasonable.



that it has long been recognized that the contributions of different commodities to the overall cost and profit of the carrers must necessarily vary if maximum utilization of the transportation facilities is to be effected and transportation services are to be provided for many commodities which would not otherwise move at full costs. Compare *Sugarcane from South Florida to Clewiston, Fla.*, 281 I.C.C. 47, 63. The single-car rate of $3.68 exceeds the restated weighted average variable costs and the restated weighted average fully distributed costs by 36.3 percent and 7.6 percent, respectively. In our judgment the single-car rates which apply on multi-car movements upon the cancellation of the multi-car rate are not unreasonably high from a cost-of-service standpoint. However, in passing upon the maximum reasonableness of a rate, the cost of service is only one of the elements that must be considered, and, is therefore not controlling. *Feigenbaum & Arons* v. *Missouri-K.-T. R. Co.*, 299 I.C.C. 630, 632. The volume of movement, the effect of the increased rate upon the movement of traffic, and the value of the commodity are among the factors which may be considered in determining a maximum reasonable rate; and it is, of course, well-settled that one of the best tests of reasonableness is a comparison of the rate in issue with rates on the same commodity moving from and to points in the same area.

Shippers of large volumes of traffic are not, by reason of that fact alone, entitled to a level of rates which is lower than that of other shippers of lesser amounts. *Cairo Assn. of Commerce* v. *Akron, C. & Y. R. Co.*, 235 I.C.C. 683, 687. Multi-car rates which are lower than normal single-car rates are designed generally to meet competition which cannot be met economically or effectively by single-car rates. Such rates have

been approved where it appeared that they were competitively necessary and were properly related to the single-car rates. See *Eastern Coal to Chicago,* 306 I.C.C. 195, 200. Here, the evidence establishes that there is no competitive necessity for the retention of the multi-car rate.

The evidence also shows that the multi-car rate and the 50-ton single-car rates are subject to the same service conditions, including the same standard demurrage provisions, the same standard free time at the ports, use of the same equipment, and the same per-car minimum weight. The record also shows that no operating economies are achieved in handling multiple-car shipments as opposed to single-car shipments. No savings in switching costs or station clerical expense is realized in handling multiple car shipments. In fact, the record indicates that in actual operations the handling of multiple-car shipments require more switching than single-car shipments and cars used for multiple car shipments are held by the shipper longer than cars used for single car shipments. Therefore, there are no operating or cost considerations which justify the continuance of the multi-car rates lower than single-car rates.

In 1959 the rail export rate on clay from the Toomsboro District of Georgia to Savannah was a single-car rate of $3.50, minimum 60,000 pounds. The single-car rates of $3.68, miniumm 100,000 pounds, and $3.96, minimum 60,000 pounds, which will apply under the proposal are, respectively, 18 cents and 46 cents per ton higher than the 1959 rate, or 4.11 percent and 13 percent higher respectively. Since the bulk of the traffic will move under the $3.68 rate, the proposal will reflect a rate increase to shippers of approximately 4 percent in an 11-year period. Over the same



11-year period the value of clay has increased from $21.49 per ton to $30.37 per ton, an increase in value of 41 percent, and the volume of the movement has increased substantially each succeeding year, even in 1968 and 1969, when the shippers were subjected to increases in the rates.

Upon this record we conclude that the proposed cancellation of the multi-car rate on export shipments of kaolin clay from the Toomsboro district of Georgia to Savannah and Port Wentworth is just and reasonable and that the single-car rates are just and reasonable for the movement of the traffic herein considered.

We find that the proposed schedules are just and reasonable.

It Is Ordered, That this proceeding be, and it is hereby, discontinued.

By the Commission, Review Board Number 4.

(SEAL)

Robert L. Oswald,
*Secretary.*

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No. 76-373

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

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INTERSTATE COMMERCE COMMISSION,
*Appellant,*

*v.*

CENTRAL OF GEORGIA RAILROAD COMPANY, *et al.*,
*Appellees.*

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*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA*

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## MOTION OF CENTRAL OF GEORGIA RAILROAD COMPANY, ET AL., TO AFFIRM

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JAMES L. TAPLEY
PETER S. CRAIG
Southern Railway Company
920 Fifteenth Street, N.W.
Washington, D.C. 20005

MICHAEL BOUDIN
888 Sixteenth Street, N.W.
Washington, D.C. 20006

NEILL W. MCARTHUR, JR.
Seaboard Coast Line Railroad
500 Water Street
Jacksonville, Florida 33202

*Attorneys for the Appellee Railroads*

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*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA*

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## MOTION OF CENTRAL OF GEORGIA RAILROAD COMPANY, ET AL., TO AFFIRM

---

Pursuant to Rule 16(1)(c) of the Rules of this Court, the appellee railroads move that the judgment of the District Court be affirmed on the ground that the issue presented is so unsubstantial as not to need further argument.[1]

### QUESTION PRESENTED

Whether the District Court correctly construed its own prior, final decision.

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[1] The appellee railroads are the Central of Georgia Railroad Company, Seaboard Coast Line Railroad Company, and Southern Railway Company.

## STATEMENT OF THE CASE

The ICC's jurisdictional statement seeks to reargue the merits of the rate dispute resolved against the ICC by a prior District Court decision, which became final after affirmance by this Court. The only facts pertinent to this case concern the correctness of the District Court's interpretation of its own final decision.

1. *The District Court's 1974 Final Decision.* In 1970, the appellee railroads ("railroads") filed tariffs having the effect of increasing certain rail freight rates on kaolin clay moving for export from the Toomsboro district of Georgia through Georgia ports. The increase came about because the railroad tariffs canceled a reduced multiple-car rate for 10-car shipments and thus made applicable to all shipments the prevailing single-car rate.[2]

After shipper interests protested, the ICC began an investigation and suspension proceeding under Section 15(7) of the Interstate Commerce Act, 49 U.S.C. § 15(7). That section provides that where the ICC investigates a newly changed rate—as opposed to an existing rate—the "burden of proof" is upon the railroad "to show that the proposed changed rate . . . is just and reasonable . . . ."[3]

Following an evidentiary proceeding, the ICC's three-member Review Board decided in November

[2] The new tariffs went into effect in October 1970, after expiration of the statutory suspension period. The rates have since been increased in subsequent rate increase proceedings that are not here in issue.

[3] By contrast, under Section 15(1), 49 U.S.C. § 15(1), the ICC may investigate existing rates but the burden is upon the party contesting the rate, practice or tariff regulation under attack to show that it is not just and reasonable. See, *e.g.*, *Louisville & N. R.R.* v. *United States*, 238 U.S. 1 (1915); *Darling & Co.* v. *Alton & S. R.R.*, 299 I.C.C. 393 (1956).



1970 that the single-car rates had been shown to be just and reasonable as applied to traffic that previously moved under the multiple-car rate. J.S. 60A-91A. The Review Board made findings favorable to the railroads on all of the factors conventionally relevant to rate increases. The Review Board found that the multiple-car rate was not justified by "competitive necessity." J.S. 90A. It agreed that there were no operating economies or cost savings obtained by the railroads on these multiple-car shipments.[4] J.S. 90A. It determined that the new rates would not be "unreasonably high" from a cost of service standpoint. J.S. 89A. Finally, it found that the rates would not significantly impede or divert the export clay traffic. J.S. 89A-91A.

In January 1972, a three-member Division of the ICC—acting through two members—reversed. J.S. 45A-59A. The Division explicitly accepted each of the four basic findings that led the Review Board to sustain the new rates. J.S. 53A-58A. The Division's decision, however, imposed a new and additional requirement that the railroads "also show the existence of circumstances and conditions by virtue of which they could not reasonably be expected to achieve cost savings normally inherent in multiple-car service."[5] J.S. 58A. The railroads expressly objected that the Divi-

[4] In fact, the Review Board found that the railroads' costs here on multiple-car shipments were actually greater, for "in actual operations the handling of multiple-car shipments requires more switching than single-car shipments and cars used for multiple car shipments are held by the shipper longer than cars used for single car shipments." J.S. 90A.

[5] Since the Division itself recognized that the railroads had made the "showing of no actual cost savings" in this instance (J.S. 58A), it was in substance conjecturing that different tariff restrictions and conditions (*e.g.*, limits on car-holding time) might result in different costs and justify different just and reasonable rates.

sion was imposing an additional requirement beyond the scope of a Section 15(7) proceeding, but the full Commission ultimately refused to review the Division decision.

The railroads then sought statutory judicial review before the three-judge District Court. They principally argued that, under the statutory plan established by Section 15(7), the findings made by the Review Board and accepted by the Division satisfied the railroads' statutory burden of proof to show that their new rates fell within the zone of "just and reasonable" rates recognized in this Court's decisions.[6] It was, the railroads argued, no part of their obligation under Section 15(7) to negate the possibility that some other just and reasonable rate might be achieved under other circumstances; and in any event under the zone of reasonableness concept, the existence of a different rate would in no way show that the railroads' own proposed rate fell outside the zone.[7]

In August 1974, the District Court unanimously sustained the railroads' principal ground of appeal and permanently enjoined the ICC's orders. 379 F. Supp. 976 (J.S. 17A-37A).[8] Citing this Court's own deci-

[6] *Atchison, T. & S.F. Ry.* v. *Wichita Board of Trade*, 412 U.S. 800 (1973); *United States* v. *Chicago, M., St. P. & P. R.R.*, 294 U.S. 499 (1935).

[7] As expressly alternative grounds to their *first* and principal ground based on Section 15(7), the railroads also argue *second* that the Division's new requirement was not supported by rational explanation and *third* that they had been denied a fair opportunity to meet the new requirement even if it was both lawful under Section 15(7) and rationally supported.

[8] The opinion was written by Circuit Judge McGowan and joined in by District Judges Hart and Pratt.



sions on the "zone of reasonableness" concept, the District Court declared that the railroads' burden under Section 15(7) was simply to show that their own new proposed rate fell within this zone, and the Review Board's findings, specifically accepted by the Division, satisfied this requirement. J.S. 17A-18A, 22A, 28A-33A. The District Court found that the Division's additional requirement misconstrued the legislative plan of rate regulation embodied in Section 15(7).

Shipper interests sought review in this Court arguing *inter alia* that the District Court had fundamentally misconstrued the scope of Section 15(7).[9] The railroads moved for summary affirmance on the ground that the statutory issue had been resolved consistently with this Court's "zone of reasonableness" decisions in the *Milwaukee* and *Wichita* cases.[10] This Court summarily affirmed the District Court's decision in May 1975, and that decision is now final. 421 U.S. 957 (J.S. 16A).

2. *The 1976 District Court Decision Under Review.* On July 24, 1975, the ICC entered an order purporting to reopen its original Section 15(7) investigation. J.S. 12A. That order sought explicitly to reimpose on the railroads exactly the same negative burden of proof re-

[9] Jurisdictional statement of United States Clay Producers Traffic Association, *et al.*, Feb. 7, 1975, pp. 3, 19-22, filed in No. 74-989.

[10] Motion of Central of Georgia Railroad Company, *et al.*, to affirm, April 9, 1975, pp. 11-14, filed in No. 74-989. In urging summary affirmance, the railroads did not even seek to argue the other two alternative grounds it had urged in the District Court (see p. 4, n. 7 above), merely reserving them as alternative grounds for affirmance in the event that the Court granted plenary review. *Id.* at 16-17.

quirement which the District Court had declared to be a violation of Section 15(7). J.S. 12A-13A. In describing the requirement reimposed by its new order, the order actually quoted (*id.*) the pertinent language originally contained in the prior Division decision which the District Court had permanently enjoined in its 1974 decision as inconsistent with the statute.[11]

The railroads asked the ICC to withdraw its order, pointing to the plain language of the District Court's 1974 decision holding the very same burden of proof requirement to be unlawful and to the District Court determination (J.S. 32A) that the Review Board's findings accepted by the Division were "conclusive" of the issue in a Section 15(7) proceeding. The ICC denied the railroads' request on the ground that the District Court's 1974 decision had merely held that "it was error not to afford the rail carriers an opportunity" to meet the burden of proof requirement imposed by the Division. J.S. 14A-15A. It then reiterated the same requirement which had previously been enjoined by the District Court. *Id.*

The railroads returned to the District Court seeking an order to compel obedience to the Court's earlier decision. The federal courts have unquestioned authority to enforce obedience to their judgments and in-

[11] The original Division decision required the railroads to show "the existence of circumstances or conditions by virtue of which they could not reasonably be expected to achieve cost savings normally inherent in multiple-car service." J.S. 58A. The new June 24, 1975, order of the ICC, reopening the same proceeding, similarly called upon the railroads to file a statement showing "the existence of circumstances or conditions by virtue of which they could not reasonably be expected to achieve cost savings normally inherent in multiple-car service . . . ." J.S. 12A-13A.



junctions by ancillary proceedings and retain continuing jurisdiction to afford such relief.[12] The ICC, in response to the motion, argued that the District Court's 1974 decision had resolved the case on "a very narrow ground, a procedural one," based on the ICC's imposition of an additional element "without affording [the railroads] an opportunity to meet the new standard." Joint opposition to motion to compel obedience, Dec. 18, 1975, p. 8.

On March 17, 1976, the District Court unanimously issued a decision construing its 1974 decision and confirming that the ICC's new endeavor was plainly inconsistent with the previous decision of the District Court. J.S. 1A. The Court stated:

> "Our [1974] decision turned upon the principal argument made by the carriers, namely, that, given the acceptance by the Commission of the facts found by the Review Board on this record, it could not, without violating the statutory scheme, impose a further burden of proof of this kind upon the carriers." J.S. 3A.

It rejected the ICC's interpretation of the opinion as one which "does not, either in its explicit terms or by any fair inference from them, bear any such construction." *Id.* The District Court stated that the ICC could not "without violation of our final judgment," reopen the Section 15(7) proceeding and reimpose the same burden of proof held by the Court to be inappropriate in a Section 15(7) case. J.S. 6A.

[12] *Riggs* v. *Johnson County*, 73 U.S. (6 Wall.) 166 (1867); *Dugas* v. *American Surety Co.*, 300 U.S. 414 (1937); *Mississippi Valley Barge Line Co.* v. *United States*, 273 F. Supp. 1 (E.D. Miss. 1967), *aff'd per curiam*, 389 U.S. 579 (1968).

Both the ICC and the United States filed notices of appeal (J.S. 38A, 40A) but only the ICC has filed a jurisdictional statement. The United States has neither filed a jurisdictional statement nor joined in the ICC's jurisdictional statement. The shipper interests, which appealed from the 1974 decision and opposed the railroads' motion below, did not file a notice of appeal.[13]

## ARGUMENT

This case does not require plenary review and the District Court's decision should be summarily affirmed. The District Court correctly construed its own 1974 decision and no further briefing and argument is needed to establish this fact. Granting that the District Court correctly construed its decision, the ICC is no longer free in this case to challenge the merits of the 1974 decision, nor is it entitled to disobey it.

1. In its decision here presented for review, the District Court correctly confirmed that its own 1974 decision rested on "the principal argument made by the carriers," namely, that given the Review Board's findings accepted by the Division, the ICC violated the statutory plan by imposing its new proof requirement. J.S. 3A. The District Court stated that its earlier decision had not rested on either of the alternative contentions made by the carriers: that the ICC's decision was deficient because the new requirement was not rationally supported and that the carriers were entitled, at the very least, to an opportunity to meet the new burden. J.S. 3A-4A.

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[13] The shipper interests—the United States Clay Producers Traffic Association—have filed a brief memorandum which supports the ICC and attempts to reargue (Clay Producers Ass'n mem. 3, 5) the same statutory question on which it previously appealed to this Court. See p. 5, n. 9, above.



The ICC's jurisdictional statement in effect seeks to challenge the District Court's construction of its earlier decision, by describing the 1974 decision repeatedly *as if* it rested on one of the alternative grounds urged by the railroads and not on the "principal argument" made by the railroads and adopted by the lower court in 1974. Repeating the plain misconstruction offered by the ICC orders which reopened this case (J.S. 12A, 14A), the ICC describes the District Court's 1974 decision as though it rested merely on the procedural ground involving a lack of opportunity to meet the burden. J.S. 9, 13. Somewhat inconsistently, the ICC also suggests that the 1974 decision rested merely on a lack of adequate explanation and adequate evidentiary support for its burden of proof requirement. J.S. 8, 14-15.

In fact, the 1974 decision rested clearly upon the statutory ground and not upon either of the alternative grounds initially urged by the railroads if their primary statutory argument failed. The 1974 decision explicitly held that the Division's new proof requirement "failed to reflect accurately the legislative scheme," that the ICC was "violating the statutory scheme" in attempting to turn a Section 15(7) case into a Section 15(1) investigation, and that the ICC's decision "does violence" to the burden of proof concept established by Section 15(7). J.S. 18A, 31A-32A, 33A. The 1974 decision referred specifically to the *Milwaukee* and *Wichita* "zone of reasonableness" decisions, which were a basic premise of the railroads' statutory argument. J.S. 22A.

Although the 1974 decision adverted briefly to facts relied upon by the railroads to support their alternative challenge to the rationality of the new require-

ment, the District Court did not offer these comments as its basic ground of decision. It made them, as it explained in its decision below, because the carriers had been accused in the District Court of bad faith for failing to address issues in the ICC proceeding which the ICC incorrectly claimed had been raised by the evidence. J.S. 4A. The District Court's 1974 decision did not even discuss, let alone rely upon, the railroads' alternative, procedural ground (see J.S. 4A); since the Court struck down the new burden of proof requirement as unlawful, it had no reason to consider whether the ICC had denied the railroads a fair opportunity to meet it.[14]

The District Court's decision in this case correctly construed its earlier 1974 decision and no further consideration of this construction issue is necessary in this Court. Given the correctness of the lower court's construction of its earlier decision, it is indisputable that the ICC's new orders were inconsistent with the earlier decision since they sought to reopen the same Section 15(7) proceeding to reimpose the same new proof requirement that the District Court had previously held to be unlawful. See pp. 5-6, above. No other issues remain open in this case since the District

[14] The ICC also appears to suggest that even if the District Court's 1974 decision rested on the statutory ground, this Court's affirmance might have been based solely on the ICC's procedural error. J.S. 9. However, it is inconceivable that this Court affirmed summarily the District Court's decision on a complex procedural issue that the District Court *did not* decide (see J.S. 4A) and that the railroads *did not* urge or brief as a basis for granting their motion for summary affirmance. See p. 5, n. 10, above. Moreover, this Court affirmed outright (J.S. 16A) the District Court's decision which explicitly rested on the statutory ground and clearly did not contemplate any further proceedings to remedy the asserted procedural defects. J.S. 31A-32A.



Court's 1974 decision became final after its affirmance by this Court in May 1975 and cannot be collaterally attacked or disobeyed by the Commission.

2. Ignoring the finality of the 1974 decision, the ICC's jurisdictional statement repeatedly attempts to suggest that the 1974 decision was erroneous. It attacks the District Court's 1974 holding as a "serious violation" of a principle that burdens in a rate case are not "static concepts," citing the *Wichita Board of Trade* decision, *supra* (J.S. 12); and it argues that the lower court's reference to a possible Section 15(1) proceeding was a "fundamental error" interfering with the ICC's latitude to structure its own proceedings under *American Lines* v. *Louisville & N. R.R.*, 392 U.S. 571 (1968). J.S. 13-14.[15]

Both the *Wichita* and *American Lines* decisions were delivered by this Court well before this Court summarily affirmed the District Court's 1974 decision, so it is obvious that this Court did not regard those cases as inconsistent with the 1974 decision.[16] In any event,

[15] The District Court's 1974 decision, as a corollary to its determination that the Division's new requirement was unlawful in a Section 15(7) proceeding, made clear that it was not foreclosing the ICC from investigating any railroad tariff or practice under Section 15(1) where the party seeking to justify a different rate, practice or tariff regulation would bear the burden of proof. J.S. 31A.

[16] In fact, neither *Wichita Board of Trade* nor *American Lines* is inconsistent in any way with the District Court's 1974 decision. The basic relevance of the *Wichita* case is its reference to the zone of reasonableness concept which directly supports the District Court's decision; the language the ICC quotes (J.S. 13-14) from the *American Lines* decision simply permitted the ICC to apply a well established principle of ratemaking to an existing case despite the possibility that it might ultimately be altered in subsequent rulemaking proceedings. 392 U.S. at 591-92.

the correctness of the 1974 decision is simply not a matter available for further litigation in this case. The ICC could have appealed that decision in 1974. Having failed to do so, it cannot collaterally attack it after it has become final.[17]

It is equally clear that the ICC cannot disobey the 1974 decision by reopening its original Section 15(7) proceeding and reimposing the same Division proof requirement declared in 1974 to violate the statutory plan. The ICC asserts generally that it possesses "flexibility" and "dynamic" powers in conducting its rate proceedings, citing this Court's decision in *United States* v. *Chesapeake & O. R.R.*, No. 75-420, June 17, 1976. J.S. 12. Neither that decision nor any other recognizes any "flexibility" or "dynamic" power enabling an agency to violate the mandate of a reviewing court, nor do the issues in *Chesapeake* have any other conceivable relationship to the present case.

The ICC also argues that the District Court's decision violates the recognized rule that a reviewing court must determine errors of law and not seek to exercise administrative functions. J.S. 11. However, the District Court's 1974 decision rested explicitly upon the ICC's violation of legal standards established in Section 15(7). The only "function" the District Court exercised in 1976 was to require the ICC to respect the 1974 decision, a decision which had found the ICC Review Board's own findings to be "conclusive" of the

[17] The Clay Producers supporting memorandum is even more blatant in seeking impermissibly to reargue the statutory issue which the District Court decided in 1974 and which the Clay Producers previously appealed to this Court. Compare Clay Producers mem. 3 with its own prior jurisdictional statement in No. 74-989, pp. 4, 19.



Section 15(7) proceeding under correct statutory standards. J.S. 32A.

The ICC finally cites several cases in which the ICC was permitted to conduct further proceedings after a reversal of its original decision.[18] However, whether further proceedings are consistent with a reviewing court's decision obviously depends on the particular legal determination made in the reversing judicial decision and on the particular issues raised in proceedings that the agency seeks subsequently to conduct. In *this* case, the ICC's own description of the reopened proceedings (see pp. 5-6, above) shows that it was patently seeking to reimpose the same burden of proof requirement that the District Court had declared unlawful in 1974; and even the ICC cannot argue that its reopening is consistent with the District Court's 1974 decision, granting that that decision (as we have shown) does rest upon the ground that the Division's new proof requirement violated the statutory plan.[19]

[18] In addition to the *Wichita Board of Trade decision* (J.S. 15), it cites *United States* v. *Saskatchewan Minerals*, 385 U.S. 94 (1966), and *Arrow Transp. Co.* v. *Cincinnati, N.O. & T.P. R.R.*, 379 U.S. 642 (1965). J.S. 13.

[19] In citing each of the cases relied on to support further proceedings, the ICC is compelled to assume—quite incorrectly (see pp. 9-12 above)—that the 1974 decision rested on one of the nonstatutory alternative grounds or that the statutory ground is open to attack. Thus, in citing *Arrow* and *Saskatchewan*, the ICC wrongly supposes that its only error in the earlier proceeding was "that the railroads were not sufficiently advised" of the Division's requirement in advance of the Review Board investigation (J.S. 13); and the *Wichita* case is cited on the erroneous assumption that the 1974 decision found merely that the Division "presumption" of cost savings "lacked a full factual basis." J.S. 15.

## CONCLUSION

For the reasons stated, the decision of the District Court should be affirmed without further briefing or oral argument.

Respectfully submitted,

JAMES L. TAPLEY
PETER S. CRAIG
Southern Railway Company
920 Fifteenth Street, N.W.
Washington, D.C. 20005

MICHAEL BOUDIN
888 Sixteenth Street, N.W.
Washington, D.C. 20006

NEILL W. MCARTHUR, JR.
Seaboard Coast Line Railroad
500 Water Street
Jacksonville, Florida 33202

*Attorneys for the Appellee Railroads*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

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No. 76-373

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INTERSTATE COMMERCE COMMISSION

v.

CENTRAL OF GEORGIA RAILROAD COMPANY, ET AL.

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**On Appeal from the United States District Court for the District of Columbia**

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## MEMORANDUM FOR UNITED STATES CLAY PRODUCERS TRAFFIC ASSOCIATION, INC.

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CHARLES W. CHAPMAN
RICHARD J. HARDY
425 Thirteenth Street, N.W.
Suite 1212
Washington, D. C. 20004

*Of Counsel:*

HARDY & CHAPMAN

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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## MEMORANDUM FOR UNITED STATES CLAY PRODUCERS TRAFFIC ASSOCIATION, INC.

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This is an appeal by the Interstate Commerce Commission and the United States from an order of a three-judge district court prohibiting the Commission from reopening the record and holding further hearings in a case * involving questions of first impression for that administrative agency. U. S. Clay Producers Traffic As-

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* Investigation & Suspension Docket No. 8544, *Clay, Points In Georgia To Savannah And Port Wentworth*, 349 ICC 377, J.S., App. J.

sociation, Inc., a party to the proceedings below, submits this Memorandum in support of the Commission's September, 1976 Jurisdictional Statement and urges the Court to find the questions presented by the appeal to be substantial.

The Commission order enjoined by the three-judge district court is an outgrowth of a recent appeal to this Court from a judgment of the same district court setting aside a decision on the merits by the Commission in the same administrative proceeding. In the prior appeal,* the judgment of the court below was affirmed without opinion on the motion of appellee railroads supported by a memorandum for the United States and the Commission.

The government's Memorandum in the prior case represented to this court that the appeal presented, "a narrow question of procedure that does not warrant plenary review," because, "if the Commission should wish in the future to adhere to its enlarged interpretation of the burden of proof requirement imposed by Section 15(7), in the context of a proposal to cancel a multiple-car rate, it will be able to do so in a hearing in which the carriers are put on notice regarding the scope of their burden of proof." (April, 1975 Memorandum for the Government in No. 74-989, p. 7.) The 'enlargement' to which the government's Memorandum referred was the statement in the Commission's decision that, "Having voluntarily established and maintained reduced rates for multicar shipments, carriers seeking cancellation *must also show* the existence of circumstances or conditions by virtue of which they could not reasonably be expected to achieve cost savings inherent in multiple-car service" (emphasis supplied—J.S., App. J, p. 58A). According to the three-

* No. 74-989, *U. S. Clay Producers Traffic Ass'n., Inc. et al.* v. *Central of Georgia R. Co., et al.*, 421 U.S. 957, J.S., App. E.



judge district court, this additional or "enlarged" burden of proof was imposed by the Commission, "after the hearing was over and at the appellate level of the administrative proceeding". (J.S., App. F, p. 30A.) That court concluded, "We are not to be understood as saying that under no circumstances could considerations of this kind be relevant with respect to the termination of a multicar rate" (J.S., App. F, p. 36A).

Thereafter, on August 20, 1975, the Commission reopened the administrative proceeding to give the railroads "an opportunity to show the existence of circumstances or conditions by virtue of which they could not reasonably be expected to achieve cost savings normally inherent in multiple car service". Upon motion of the railroads, the same three-judge district court enjoined the Commission's order upon the ground that such a showing is, "inappropriate for a Section 15(7) case" despite the court's concession that there would be no impediment to a "new challenge" to the railroads' tariffs "in the form of a Section 15(1) proceeding" (J.S., App. A, p. 6A). It is this attempt to distinguish between the Commission's powers in a "Section 15(7) case" as compared to those it concededly possesses in "a Section 15(1) proceeding" which Clay Producers believes to be the essential, and substantial, error in the district court's present decision.

**Section 15(7) Of The Interstate Commerce Act Confers No Lesser Authority Upon The Commission To Condemn Railroad Rates Than Does Section 15(1) Of The Act**

The provisions of § 15(7) of the Interstate Commerce Act have been part of the law since the Mann-Elkins Act of 1910. Prior to that time the Commission had no power to suspend proposed rate changes. See *Arrow Transp. Co.* v. *Southern R. Co.*, 372 U.S. 658, 662-664 (1963) for a discussion of the history of the section. In the first Commission decision following passage of the new provi-

sions of the act, the Commission was called upon to define its purpose. In *Advances in Rates—Western Case*, 20 ICC 307 (1911) the Commission, under the caption "Construction of New Law", discussed the legislative history, and then said:

> The question before the Commission is that which would have arisen had these rates gone into effect and a formal complaint been made against them as unjust and unreasonable. We may establish the rates proposed as reasonable, one or all of them, or reduce the proposed rates. For "the Commission may make such order in reference to such rate * * * as would be proper in a proceeding initiated after the rate had become effective." The purpose of Congress was to give this Commission the *same plenary power* over increased rates that since the enactment of the Hepburn Act it has enjoyed over other rates.
>
> The assumption of the law is that the railroad which increases its rates takes such action knowing that the law casts upon it—if challenge is made either by this Commission or otherwise—the burden of justifying its action. Theirs, in the language of the learned Dean Wigmore, is "the risk of nonpersuasion". *Wigmore on Evidence*, SEC. 2485. The railroad must assume to prove to this Commission that the new and the increased rates are within the words of description and limitation used in the act; that is, that they are just and reasonable. And to say that they must satisfy our minds of this fact. (pp. 314 & 315-316, emphasis added)

Thirty-eight years later this Court, In *Ayrshire Collieries Corp.* v. *United States*, 335 U.S. 573 (1949), cited that Commission report in support of the following statement regarding the breadth of § 15(7):

> That section, which gives the Commission broad authority upon complaint or its own initiative to investigate and determine the lawfulness of any new rate, provides that "after full hearing, whether completed before or after the rate, . . . goes into effect the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective".
>
> The power of the Commission to deal with the situation as if the proposed new rate had become effective is necessarily a comprehensive one. It seems too plain for argument that such broad authority is ample for the modification of either proposed or existing rates or both. The power granted the Commission under § 15(1) to deal with rate schedules already effective supports that view.* (pp. 581-582)



More recently, the Commission, in *Sulfur, Canadian Origins to East St. Louis, Ill.*, 326 ICC 288 (1966) said:

> The standards of lawfulness are the same whether the proceeding involves a shipper complaint under § 1(5) of the act or an investigation instituted pursuant to § 15(7); the latter section, as here pertinent, *merely governs the burden of proof* with respect to proposed rates. (p. 298, emphasis added)

In light of these authorities, it is plain that the lower court has simply misconceived the interrelationship of §§ 5(7) and 15(1). The former is inclusive of the latter insofar as concerns the range of permitted inquiry and scope of the Commission's power to act. They differ only insofar as § 15(7) squarely imposes the burden of proof upon carrier proponents of a rate change, as to all of the issues cognizable under either section. In a sense very different from that which the lower court intended, it is quite true that the Commission "cannot . . . turn a Section 15(7) case into a Section 15(1) investigation". To

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* Because the language of § 15(7) quoted in the first excerpted paragraph of the Court's opinion gives the Commission the same ordering power as it has under § 15(1)—as the lower court expressly recognized in its own description of § 15(7). (J.S. App. F, pp. 21A, 22A)

do so would not, as the court supposes, enlarge the area of inquiry, but shift the burden of proof to the person challenging the rate change, rather than leaving it where Congress placed it, upon the carrier proponent of that change.

This Court has reversed the Commission for *refusing*, in a proceeding initiated under § 4, to consider and dispose of related issues arising under other sections, with different standards and objectives. In *Mechling Barge Lines* v. *United States*, 376 U.S. 375 (1964), the Court recited and rejected the Commission's defense:

> . . . the Commission does not believe that this policy requires it to consider and decide, in a fourth-section proceeding, every allegation of rate unlawfulness, no matter how remote. Continuing, the Commission argues that since the attack on the rates was on a proportional factor, the 6¢, and not on the through charge, these other claims of unlawfulness were beyond the immediate § 4 issues. We cannot agree that the mechanism of the rate under attack permits of such easy dismemberment.
>
> If the proceeding is splintered, contestants will be obliged to await the conclusion of § 4 proceedings before raising claims of violations under other sections of the Act. Not only would this be poor administration but it would result in manifest inequities and allow potential windfalls to some carriers. (pp. 382-383)

The language and rationale are, of course, far more cogent here, where the issues, which the lower court would insist *must* be splintered, differ only in terms of their relative traditionality vs. novelty. A shipper challenging the reasonableness of suspended rate changes would be confined to attempted rebuttal of whatever may be the "traditional factors" covered in the carriers' *prima facie* case. All other possible challenges, even though relevant to reasonableness, would be deferred to a § 15(1) proceeding to be initiated by the shipper, as a complainant, if and after the carrier is found to have met its burden of proof in the § 15(7) proceeding. Here this would mean beginning an entirely new Section 15(1) case after six years of litigation under Section 15(7). This just does not make any sense.



For these reasons, and those urged by the Commission in its Jurisdictional Statement, Clay Producers submit that the district court has fundamentally misconstrued Sections 15(7) and 15(1) of the Act thereby presenting substantial questions warranting either plenary review or summary reversal.

Respectfully submitted,

CHARLES W. CHAPMAN
RICHARD J. HARDY
425 Thirteenth Street, N.W.
Suite 1212
Washington, D. C. 20004

*Of Counsel:*

HARDY & CHAPMAN
September, 1976